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No. 10,078

United States

Circuit Court of Appeals

For the Ninth Circuit.

Vol 2298

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

Transcript of Record

In Two Volumes

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

Civil No. 714-J Civil

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Plaintiffs,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Defendants.

BILL OF COMPLAINT

(Stockholders' suit to cancel certain instruments, and for other relief.)

The plaintiffs above named present this, their bill of complaint against the defendants above named, and allege:

I.

Helen M. Sutherland and Charles W. Sutherland, Plaintiffs herein, are each citizens of the Dominion of Canada; M. I. Higgens and Maybelle Higgens, plaintiffs herein, are each citizens of the State of Idaho; Helen Maude Lorenz, plaintiff herein, is a citizen of the State of Oregon.

II.

Frank A. Garbutt and Alice Clark Ryan are each citizens [2] of the State of California. Chandis Securities Company is a corporation organized under the laws of the State of California.

Mutual Gold Corporation was organized as a corporation under the laws of the State of Washington May 11, 1932, and still so is. November 18, 1933, Mutual Gold Corporation duly qualified under the laws of the State of California to engage in business therein, and ever since has been so qualified.

About October 18, 1938, Log Cabin Mines Company was organized as a corporation under the laws of the State of California. Its capital stock was divided into ten thousand (10,000) shares, each share One Dollar ($1) par.

III.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand ($3,000) Dollars.

IV.

At and during all the times in this complaint mentioned the plaintiffs, and each of them were, and are, stockholders owning shares of the capital stock of Mutual Gold Corporation, to-wit: Helen M. Sutherland 333 shares, Charles W. Sutherland 333 shares, M. I. Higgens 333⅓ shares, Maybelle Higgens 333⅓ shares and Helen Maude Lorenz 500 shares, and each were such stockholders of Mutual Gold Corporation at the time of each of the trans-

actions herein complained of; that this action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. Plaintiffs maintain this action as stockholders of and for and on behalf of Mutual Gold Corporation, and for and on behalf of all of the stockholders of Mutual Gold Corporation [3] similarly situate, for that the controlling majority of the directors, trustees, and the majority of the stockholders thereof are not in sympathy with, but opposed to, the institution of this or any suit for the relief from or concerning the matters herein complained of, for which relief is sought in and by this action; that any request for any relief would be idle and without avail, as will hereinafter more fully appear, for which reason no demand has been made by plaintiffs to the board of directors, trustees, or stockholders of Mutual Gold Corporation, for the institution of this suit, or for the relief, or any similar relief, to that sought herein.

V.

July 13, 1932, Russell F. Collins and Ben L. Collins entered into a contract with Chandis Securities Company, M. N. Clark and Alice Clark Ryan to purchase certain mining claims situate in Mono County, State of California, on the terms, conditions, and for the considerations stated therein, a copy of which is hereto attached, marked "Exhibit 1", and made a part hereof, and is herein designated as the "purchase contract". The mining

claims therein agreed to be sold are herein designated as the "contract mining claims". July 18, 1932, Russell F. Collins and Ben L. Collins assigned the purchase contract unto Mutual Gold Corporation, and it became vendee, with approval of the vendors. About 1935, M. N. Clark assigned her interest in the purchase contract and in the contract mining claims to Alice Clark Ryan. Alice Clark Ryan and Chandis Securities Company are herein designated as the "owners". The parties later agreed on certain modifications of the purchase contract, copies of which are hereto attached, marked "Exhibit 2", "Exhibit 3" and "Exhibit 4", and [4] made a part hereof. Frank A. Garbutt represented the owners as agent in negotiation of the purchase contract, and in respect to all matters of performance thereof since then.

VI.

Mutual Gold Corporation, in performance of the purchase contract, expended in excess of the sum of One Hundred Fifty Thousand Dollars ($150,000) and in so doing erected a stamp mill, did underground excavation work in the development of, and mining, the contract mining claims, and thereby developed ore bodies in excess of one hundred twenty-five thousand (125,000) tons, containing recoverable gold values of One Million Six Hundred Fifty Thousand Dollars ($1,650,000).

VII.

September 2, 1938, Mutual Gold Corporation owned (a) the purchase contract and the vendees' interest in the purchase mining claims, (b) the additional mining claims, (c) omitted additional mining claims conveyed by a specific designation, by deed, "Exhibit 15" hereof, and (d) stamp mill, mill and mining machinery, supplies and equipment. All of said assets were then, and still are, of a reasonable value in excess of Two Million Dollars ($2,000,000). The stamp mill, mill and mining machinery, supplies and equipment, were of the reasonable value of Forty Thousand Dollars ($40,000). The claims designated as "additional mining claims" were certain unpatented mining claims adjacent to the contract mining claims and were of the reasonable value in excess of Thirty Thousand Dollars ($30,000). The omitted additional mining claims are specifically designated as Mutual Gold Lode No. 2, Mutual Gold Lode No. 3, Mutual Gold Lode No. 4, [5] Mutual Gold Lode No. 5 and Mutual Gold Lode No. 6, and were of negligible value.

VIII.

September 2, 1938, and ever since, Mutual Gold Corporation owed about Twenty-five Thousand Dollars ($25,000) upon open, unsecured accounts then due, and owed on production certificates Thirty Thousand Dollars ($30,000), not due, payable out of net production receipts accruing from the sale of ores from its mining property or out of the pro-

ceeds of a voluntary or involuntary sale thereof, as set out in the production certificates, a form copy of which is attached hereto, marked "Exhibit 5", and made a part hereof.

IX.

August 6, 1938, and thereafter, Frank A. Garbutt fraudulently, wrongfully and unlawfully conspired with and prevailed upon the board of directors and executive officers of Mutual Gold Corporation to agree to the transfer of all its assets to a new corporation to be organized for and on behalf of Mutual Gold Corporation, for which Mutual Gold Corporation was to receive fifty per cent, minus one share, and Frank A. Garbutt fifty per cent, plus one share, of all the capital stock of the new corporation, which new corporation was to have no capital or assets, other than the assets of Mutual Gold Corporation, without authorization of the stockholders of Mutual Gold Corporation, and without provision to pay, or care for, the claims of creditors of Mutual Gold Corporation, to evade, circumvent and violate the laws of the State of Washington, to the injury of Mutual Gold Corporation, its stockholders and creditors. The [6] several transactions herein complained of were done and executed to carry out said purposes and objects, and were, and are, in violation of, and void under the laws of the State of Washington.

X.

August 25, 1938, pursuant thereto, Frank A. Garbutt, without valid cause or justification, wrongfully gave to Mutual Gold Corporation notice of forfeiture of the purchase contract and, while forfeiture was insisted upon, wrongfully, fraudulently and unlawfully prevailed upon the board of directors and executive officers of Mutual Gold Corporation to make on September 2, 1938, an agreement to sell and convey to Frank A. Garbutt, to be later transferred to the proposed new corporation, all of the assets of Mutual Gold Corporation; that a copy of said agreement is hereto attached, marked "Exhibit 6", and made a part hereof. Concurrently therewith, Frank A. Garbutt arranged to advance, and later did advance, the personal expenses of two of said directors, and agreed to, and did, employ one of said directors to work for him in the negotiation for, and execution of, the several contracts and conveyances complained of herein, and in the operation of said mining property, and for said services paid said director compensation pursuant to arrangement previously agreed to, and thereby fraudulently influenced said board of directors to execute the several contracts and conveyances hereby complained of.

XI.

September 21, 1938, Frank A. Garbutt prevailed upon the board of directors and executive officers of Mutual Gold Corporation illegally, and without consideration, to execute a [7] deed, bill of sale

and assignment of the purchase contract to him, copies of which instruments are hereto attached, marked "Exhibit 7", "Exhibit 8" and "Exhibit 9", and made a part hereof.

XII.

September 22, 1938, Frank A. Garbutt prevailed upon the board of directors and executive officers of Mutual Gold Corporation to enter into an agreement with him, containing identical provisions and terms as that of said agreement of September 2, 1938, "Exhibit 6", with like purpose and intent.

XIII.

October 18, 1938, Frank A. Garbutt caused to be filed in the Office of the Secretary of State of the State of California, articles of incorporation of Log Cabin Mines Company.

XIV.

September 26, 1938, stockholders of Mutual Gold Corporation complained to its board of directors and to Frank A. Garbutt, charging that the contract of September 2, 1938, "Exhibit 6", and the deed, bill of sale and assignment of the purchase contract, "Exhibits 7, 8 and 9", were in violation of the laws of Washington in respect to the transfer of all of the assets of Mutual Gold Corporation in consideration of stock in the proposed new corporation, and had been obtained by Frank A. Garbutt from Mutual Gold Corporation unconscionably by

assertion of claim of forfeiture, by fraud, coercion, and without provision to pay the creditors of Mutual Gold Corporation; said directors, considering said complaint, in conspiracy with Frank A. Garbutt, [8] refused to grant any relief in the premises, but thereafter, because of said objections, and to avoid the force thereof, Frank A. Garbutt assumed and pretended to withdraw from the agreements of September 2, 1938 "Exhibit 6" hereof, and September 22, 1938, and gave notice of such withdrawal to Mutual Gold Corporation. Concurrently therewith the said Frank A. Garbutt wrongfully and unlawfully conspired with and prevailed upon a majority of the board of directors and executive officers of Mutual Gold Corporation to enter into an agreement of date November 1, 1938, with Frank A. Garbutt. The notice of withdrawal and concurrent agreements are hereto attached, marked "Exhibit 10", and made a part hereof. Said agreement lacked a good faith affidavit, and was not filed nor recorded as a mortgage. Frank A. Garbutt and said board of directors intended the notice of withdrawal and concurrent agreement to be of no force or effect; there was no change of possession, nor of the operation of the property.

XV.

About December 17, 1938, Frank A. Garbutt wrongfully and unlawfully conspired with, and prevailed upon, a majority of the board of directors and executive officers of Mutual Gold Corporation,

illegally, without any consideration whatever therefor to Mutual Gold Corporation, contrary to the laws and public policy of the State of Washington, and in fraudulent disregard of the rights of Mutual Gold Corporation, its stockholders and creditors, to execute, in writing, a contract with, and between, himself and the aforesaid Log Cabin Mines Company, a copy of which is hereto attached, marked "Exhibit 11", and made a part hereof, and was, and is, unilateral in form and effect, and without, by its terms, any contractual or binding force or effect [9] whatever upon the said Frank A. Garbutt, wherein a purported option was pretended to be given to Log Cabin Mines Company on the terms therein stated, to acquire the aforesaid purchase contract, contract mining claims, additional mining claims, and the personal property, constituting all of the assets of Mutual Gold Corporation.

XVI.

April 10, 1939, Frank A. Garbutt wrongfully and unlawfully conspired with, and prevailed upon, the board of directors and executive officers of Mutual Gold Corporation to execute a deed and bill of sale to Log Cabin Mines Company of all of its assets, except the omitted additional mining claims, copies of which deed and bill of sale are hereto attached, marked "Exhibit 12" and "Exhibit 13" and made a part hereof, and assignment of the purchase contract.

XVII.

April 17, 1939, Frank A. Garbutt prevailed upon the board of directors and executive officers of Mutual Gold Corporation, on behalf of Mutual Gold Corporation, to subscribe for all of the capital stock of Log Cabin Mines Company, and in form he loaned Mutual Gold Corporation the sum of Ten Thousand Dollars ($10,000) to pay said subscription, and contemporaneously therewith he caused Lob Cabin Mines Company to appoint him manager and treasurer of Log Cabin Mines Company and, as such, gave him control of said Ten Thousand Dollars ($10,000), which amount Mutual Gold Corporation and Log Cabin Mines Company agreed to repay to him. Five thousand one (5,001) shares of the stock of Log Cabin Mines Company were thereupon issued to Frank A. Garbutt, as owner, and [10] *and* four thousand nine hundred ninety-nine (4,999) shares thereof were issued to Mutual Gold Corporation, but pledged to Frank A. Garbutt to secure the purported loan of Ten Thousand Dollars ($10,000).

XVIII.

July 21, 1939, in furtherance, and as a step in the consummation of the aforesaid fraudulent purpose and plan, without any consideration whatsoever therefor moving to Mutual Gold Corporation, its stockholders or creditors, illegally and in fraudulent disregard of the rights of Mutual Gold Corporation, its stockholders and creditors, Frank A.

Garbutt, with the knowledge and approval of the owners, executed a deed purporting to convey to Log Cabin Mines Company the property purported to have been conveyed to him by Mutual Gold Corporation by the deed, assignment and bill of sale which bear date September 21, 1938, "Exhibits 7, 8 and 9" hereof, reserving therefrom the accumulated tailings from milling and processing in past years, all with the knowledge and approval of the owners, a copy of which deed is hereto attached, marked "Exhibit 14", and made a part hereof.

XIX.

August 9, 1939, Frank A. Garbutt prevailed upon the board of directors and executive officers of Mutual Gold Corporation to execute a deed of said omitted additional mining claims to Log Cabin Mines Company, a copy of which is hereto attached, marked "Exhibit 15," and made a part hereof.

XX.

September 2, 1938, under the contract of that date, [11] "Exhibit 6" hereof, Frank A. Garbutt, with the approval of said board of directors, took possession of the purchase mining claims and all the other assets of Mutual Gold Corporation, and ever since has been, and is now, in possession thereof, and has operated all of said property as the purported manager of the property of Mutual Gold Corporation. During that period he has mined and removed from the contract mining claims, and

wrongfully reduced and converted to his own use, large quantities of valuable mineral extracted from the ores therefrom, the value of which is large and substantial, but the amount is not known to plaintiffs; that Frank A. Garbutt, unless restrained by order of this court, will, and he threatens to, continue the mining, removal, reduction and conversion of the ores of said mine, and will continue to do so, all to the great and irreparable loss of Mutual Gold Corporation.

XXI.

Each of the contracts, deeds, bills of sale and assignments were executed, and the said acts of Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company were done, with the knowledge and approval of the owners, pursuant to, and as a part of said unlawful conspiracy to transfer all of the assets of Mutual Gold Corporation to Log Cabin Mines Company, without consideration, for a minority stock interest in Log Cabin Mines Company, without authorization by, or approval of, the stockholders of Mutual Gold Corporation, and with the disapproval of nearly one-third of the stockholders of Mutual Gold Corporation, and were, and are, severally ultra vires the corporate powers of Mutual Gold Corporation, in excess of the powers of the board of directors and executive officers of Mutual [12] Gold Corporation, in that no meeting of stockholders of Mutual Gold Corporation was ever called or held, nor any action taken by unani-

mous vote, or any vote of the stockholders, or any number of stockholders of Mutual Gold Corporation, or otherwise, in authorization thereof, or to organize Log Cabin Mines Company, transfer the assets of Mutual Gold Corporation to Log Cabin Mines Company for a stock interest, or any interest, minority or otherwise, in and of Log Cabin Mines Company; that each and every of said contracts, deeds, bills of sale and assignments were, and are, in violation of the laws of the State of Washington and of the State of California, and all thereof were executed, and said acts were done, with the knowledge and approval of the owners, in order to deprive Mutual Gold Corporation of all of its assets, and receive in return a minority stock interest in Log Cabin Mines Company, and with the intent to deprive Mutual Gold Corporation of the exercise of its corporate powers and rights under the laws of the State of Washington, and vest in Frank A. Garbutt as the agent of the owners, the exclusive power and discretion of performance and nonperformance of the purchase contract, and cause Mutual Gold Corporation to be remediless in the premises except at the will and discretion of Frank A. Garbutt.

XXII.

The installment of Ten Thousand Dollars ($10,000) due on the purchase contract November 1, 1939 has not been paid; that Frank A. Garbutt, personally, and as manager and treasurer of Log Cabin Mines Company, has withheld, failed to ac-

count for, or apply, the royalties from operation on the purchase contract, to pay, so far as may be, said installment. The owners have at all times since September 2, 1938, wrongfully refused to recognize [13] Mutual Gold Corporation as the owner of the purchase contract. Whereupon plaintiffs, as such stockholders of Mutual Gold Corporation, and in its behalf, hereby offer to pay the amount of said installment to keep the purchase contract in good standing as the property of Mutual Gold Corporation, and, upon such payment, be subrogated to all the rights of the owners in respect to said installment.

XXIII.

The directors of Mutual Gold Corporation called a special stockholders' meeting for September 24, 1938 to ratify or disapprove the contract of September 2, 1938 "Exhibit 6" hereof. The call was rescinded about September 19, 1938 on account of opposition of stockholders to said transactions. Thereupon the board of directors caused the conveyances of September 21, 1938 above referred to, to be executed. September 24, 1938, stockholders in opposition to the transactions here under attack organized a stockholders' protective committee, representing about five hundred thousand (500,000) shares of stock, all opposed to said transactions; plaintiffs sue herein on behalf of all stockholders similarly situate, including the stockholders represented by said protective committee.

XXIV.

The directors of Mutual Gold Corporation are seven in number, two only of whom have opposed, and still oppose, the several acts, agreements and conveyances herein complained of. The president of Mutual Gold Corporation is one of the five members who caused to be done the several acts, and executed the several agreements and conveyances herein complained of. Said [14] five directors constitute the controlling majority of the board of directors of Mutual Gold Corporation and are designated herein as the board of directors.

Ever since August 6, 1938, not less than five out of seve*l* of the directors of Mutual Gold Corporation have been firmly committed to do, and have done, the several acts herein complained of, and executed the several agreements and conveyances aforesaid. At several meetings of the directors the plaintiffs and stockholders similarly situate have protested against, and complained of, said several acts, agreements and conveyances, but all of said protests and complaints have been ignored and denied, and the board of directors and executive officers have, notwithstanding said protests and complaints, proceeded to do and have done and consummated the several acts, agreements and conveyances herein complained of.

At the annual meeting of the stockholders of Mutual Gold Corporation, held February 1, 1939, said board of directors and executive officers, without

previous notice or call to the stockholders, caused to be presented a resolution which was adopted by a majority vote of the stockholders of Mutual Gold Corporation, ratifying the agreement of December 17, 1938 and authorizing the board of directors to make any other contracts or conveyances to carry out and perform said agreement of December 17, 1938. That at said meeting stockholders similarly situate as plaintiffs applied for relief, and objected to each and every of said acts, agreements and conveyances that had been made up to that time; by a majority vote of the stockholders said application for relief and protests were denied.

Plaintiffs and other stockholders similarly situate have applied to the president of Mutual Gold Corporation to call a [15] stockholders' meeting to specially consider said acts, agreements and conveyances and to obtain relief therefrom, including the maintenance of this action; the president has refused, and still refuses, to call a stockholders' meeting; at the present time five of the directors of Mutual Gold Corporation are opposed to the maintenance of this action, antagonistic to, not in sympathy with, and opposed to the institution of this, or any, suit or proceeding for the relief sought in this action, or any relief, from or concerning the transactions, matters and things herein complained of, and for which reason any request, formal or otherwise, to the executive officers or to the directors, would be, and is, without avail.

XXV.

The number of shares represented by the plaintiffs herein is less than one-third of all the outstanding stock of Mutual Gold Corporation, and there is no way provided for by the articles of incorporation of Mutual Gold Corporation, or its by-laws, whereby plaintiffs, or any other stockholders opposed to the transactions herein complained of, may obtain relief or action by the corporation, its directors, executive officers or stockholders. That the plaintiffs and the stockholders in sympathy with them are not sufficient in number to compel the calling of a special stockholders' meeting at which relief may be sought.

XXVI.

At all times since April 17, 1939, the directors and executive officers of Log Cabin Mines Company have been residents of the State of California, and absent from the State of Washing- [16] *ing*ton. Frank A. Garbutt, at all times mentioned in this complaint, and Log Cabin Mines Company, at all times since its incorporation, have each been, and are, residents of the State of California, and absent from the State of Washington. Each of them is unwilling to, and refuses to submit to the jurisdiction of the courts of the State of Washington.

XXVII.

By virtue of the aforesaid acts defendant Mutual Gold Corporation has not, nor have plaintiffs, any

adequate or other remedy at law whereby to obtain redress for, and protection of the rights of, Mutual Gold Corporation, its interest and title in and to the aforesaid mining claims and the ores extracted therefrom, nor for and on account of the aforesaid personal property of defendant Mutual Gold Corporation, and for and on account of which adequate relief can only be furnished by, and obtained in, a court of equity; plaintiffs further allege that they are willing, and hereby offer to do equity in the premises as same may be adjudged, declared and determined by this court, and they are likewise willing, and hereby offer, to abide by and perform any and all requirements and conditions that may be imposed by the court as attendant on, and precedent to the granting of the relief prayed, or to which the court may conclude the plaintiffs and other stockholders and creditors are entitled.

Wherefore, Plaintiffs, on behalf of Mutual Gold Corporation, pray by decree:

First: That the agreements, deeds, bills of sale and assignments of the purchase contract, "Exhibits 6, 7, 8, 9, 10, [17] 11, 12, 13, 14 and 15" be severally adjudged to have been wrongfully, fraudulently and illegally executed, and adjudged void and to be of no force and effect, and all claims of right thereunder terminated.

Second: That the status of Mutual Gold Corporation as vendee, owner, of the purchase contract, be determined; that the accrued royalties

from operation be accounted for and applied, so far as may be, in discharge of the installment of Ten Thousand Dollars ($10,000) due on the purchase contract November 1, 1939, and that Chandis Securities Company and Alice Clark Ryan be required to recognize Mutual Gold Corporation as vendee, owning the purchase contract, and to accept from these plaintiffs, as stockholders of Mutual Gold Corporation, on its behalf, the unpaid balance of said installment.

Third: That defendant Frank A. Garbutt and Log Cabin Mines Company, a corporation, and each of them, be ordered and required to execute and deliver to defendant Mutual Gold Corporation such and all conveyances and acquittances of the aforesaid premises and personal property as may be found to be, or may at any time become necessary fully to reinvest legal title to said properties in defendant Mutual Gold Corporation, and that said properties be surrendered up and delivered to it. That defendants Frank A. Garbutt and Log Cabin Mines Company, and each of them, be likewise required to make a general accounting with respect to all ores, and the proceeds mined or extracted by them, or either of them, or under his or its authority, from said mining properties, likewise for the proceeds of all ores extracted therefrom by third persons and thereupon and there- [18] after delivered to, and received and disposed of by, defendants Frank A. Garbutt and Log Cabin Mines

Company, or either of them, and likewise that they be required to account for any and all ores extracted from said premises and still remaining in the possession or under the control of defendants.

Fourth: That defendants Frank A. Garbutt and Log Cabin Mines Company, and each of them, be enjoined, restrained and ordered to desist, pendente lite, from excavating, extracting or removing ores, or other property of any kind or character, from said lands, and that they be required, pendente lite, to abstain and refrain from further, or any mining operations of any character on said premises.

Fifth: That plaintiffs have and recover their costs and disbursements incurred herein, including a reasonable fee for the use and benefit of their attorneys, together with such other further and general relief as to the court may seem equitable, just and appropriate in the premises.

W. H. ABEL
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FREDERICK D. ANDERSON
650 Subway Terminal Building
Los Angeles, California
MIchigan 0804
Attorneys for Plaintiffs [19]

State of Idaho,
County of Kootenai—ss.

M. I. Higgens being first duly sworn, deposes and says: that he is one of the plaintiffs named in

the foregoing bill of complaint, and that he makes this verification on his own behalf and on behalf of his co-plaintiffs; that he is familiar with the contents of said bill of complaint and that the matters and things therein contained are true in substance and in fact.

MILTON I. HIGGENS

Subscribed and sworn to before me this 14 day of December, 1939.

(Seal) J. WARD ARNEY

Notary Public in and for the State of Idaho, residing at Couer d'Alene; My commission expires 11-1-43. [20]

Exhibit 1

This Agreement of Sale made this 13th day of July, 1932, by and between the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, of Los Angeles, California, hereinafter designated as the Sellers, and Russell F. Collins, of Seattle, Washington, and Ben L. Collins, of Spokane, Washington, hereinafter designated as the Buyers, witnesseth:

That for and in consideration of the payments to be made by the Buyers to the Sellers at the times and in the manner herein specified, and in consideration of the promises and agreements to be well and truly performed by the said Buyers, the said

Sellers hereby agree to sell to the said Buyers the following described patented and unpatented lode mining claims situate in Mono County, California, and more particularly described as follows, to-wit:

Log Cabin	Mill Site
Log Cabin No. 1	New Year No. 2
Log Cabin No. 2	Federal No. 1
Log Cabin No. 3	Federal No. 2
Log Cabin No. 4	Federal No. 3
Log Cabin No. 5	Log Cabin Annex
Log Cabin No. 6	Tamarack
Log Cabin No. 7	Oro
Log Cabin No. 8	Burke Fraction

All of the above described claims having been recorded at one time or another at Bridgeport, Mono County, California, in what has been known at various times as the Mono Lake Mining District, the Bridgeport Mining District and the Homer Mining District.

And also such water rights as the said Sellers may own in connection therewith.

The condition of the titles to said property is as follows:

Log Cabin claims, Log Cabin No. 2, Log Cabin No. 6 and Log Cabin No. 7 are patented. [21]

Log Cabin Annex is a mining location filed recently at Bridgeport by H. R. Bradley and deeded by H. R. Bradley and wife to the Sellers herein.

Claims Log Cabin, Log Cabin No. 1, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 4, and Log

Cabin No. 6 are mining locations and in the option of the Sellers can be patented at any time.

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It is stated by James Simpson that claims New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Tamarack, Oro and Burke Fraction have all had the assessment work done on them and title to them is in good condition.

The Sellers or their immediate predecessors in interest have located these claims and have held title thereto for approximately twenty (20) years and believe their titles to be good and they hereby represent that there are no mortgages, indebtedness or other encumbrance against said claims of which they have any knowledge, but they expressly disclaim any liability for these titles, and the Buyers, having been afforded an ample opportunity to examine same, hereby accept said titles, it being distinctly understood that the only estate to be conveyed hereunder is all of the right, title and interest which the said Sellers may have or may hereafter acquire thereto.

This agreement of sale is to extend for a period of five (5) years from the date hereof unless sooner forfeited or terminated as hereinafter provided. Under this agreement the said Buyers shall have the right of Possession with the right to mine and develop said properties or any of them, including the right to follow and explore by proper working any vein or veins within said group of claims to

the limit or exterior [22] boundary lines thereof, to the same extent and no other as the Sellers, by virtue of their title and interest in said group of claims, have or may hereafter acquire, and to follow any ore shoot or ore body found within the limits of said property in any direction to the same extent as said Sellers might lawfully do, and to break down and remove and mill or sell all commercial ores found therein except as hereinafter expressly provided, to-wit:

It is understood and agreed that until said Sellers have been paid in full for said mining claims, in accordance with the terms hereof, that the ore already exposed above the present drifts on the vein at a depth of approximately 125 feet below the collar of the shaft and within the present extreme north and south faces shall remain intact and unless expressly permitted by permission in writing from said Sellers none of this ore shall be mined or removed from the mine and neither shall any ore at present on the dump be removed or milled by said Buyers.

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In consideration of the agreements herein contained the said Buyers covenant and agree with said Sellers as follows:

1. To enter upon said mining claims immediately after the execution and delivery of this agreement and after the posting of the notices hereinafter provided to be posted, and agree to work the

same continuously and in good workmanlike and minerlike manner so as to develop said property with due regard for the continuance and preservation of the same as a workable mine in accordance with the covenants herein set forth.

2. The Buyers agree to work at least sixty (60) shifts of one man each of eight (8) hours' duration per month until August 10, 1932, after which date said Buyers agree to work not [23] less than one hundred fifty (150) similar shifts per month of eight (8) hours each during the life of this agreement, it being understood that each shift is to consist of the day's work of one competent miner or its equivalent in value. It is agreed that the excess of 150 shifts per month for any given month is to be credited on work to be performed during the succeeding month or months during each year, but that work during one year is not to be credited to the work to be done in any succeeding year, and that the said Buyers agree that there at all times shall be enough work performed by them to fulfill any work necessary to be performed for assessment purposes.

4. The Buyers agree to install a compressor, pump, machine drills and other necessary equipment to sink the present shaft that is now down one hundred twenty-five (125) feet from the surface to a total depth of two hundred fifty (250) feet or to the point of its intersection with the vein and to drift upon the vein from the point of intersection for a distance of not less than two

hundred (200) feet, and to do any other development work that said Buyers may deem advisable for the development of additional ore.

5. The said Buyers agree to well and sufficiently timber the tunnels, shafts and drifts used, opened or extended by them when necessary in said mining at all points and in accordance with good mining methods and to repair all old timbering in such

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workings and in all existing openings which are now open and which show any mill ore. This work of timbering and retimbering is to be done whenever and wherever it may become necessary for the safety of workmen and ore and for the preservation of said mine as a working mine, and said Buyers agree [24] to fill all stopes with waste after the ores therefrom are removed so as to keep and leave said mine in a safe and proper condition for further development and exploration and in accordance with the usual custom of good miners.

6. The said Buyers agree that the said Sellers may at all times enter, in person or by their duly authorized agents in writing, to inspect said property and any and all parts thereof, and the said Sellers shall have the right to keep one or more representatives at all times upon said property to represent them and to inspect same but always at their own sole cost and expense except that the said Sellers may furnish one representative who shall be a practical miner or a practical mining man, able and willing to work for the said Buyers, performing such

work as may properly be allotted to him, and this representative the said Buyers agree to pay the same wages as they pay to other employees in a similar capacity, it being understood that should the representative so nominated by said Sellers not perform as much useful work as their other similar employees that the said Sellers will either accept reduced pay for him or furnish another representative to take his place.

7. The said Buyers agree to pay for all labor, material and supplies employed or used by them in the development and operation of said mining claims under this agreement, including the payment of all taxes and assessments from and after the date of July 13, 1932, during the term of this agreement, and said Buyers agree not to permit any lienable claims, including such labor, material or supplies, to be filed against said mining property, and agree to save said Sellers harmless therefrom.

[25]

8. The said Buyers agree that before they allow any material, machinery or supplies to be brought upon said property that they will obtain and furnish to the said Sellers a release or waiver from the venders thereof releasing and waiving any right or rights which said vendors may have to file a lien or liens against the property of the Sellers, and in like manner, before employing any labor therein, will obtain from the employees who are to perform this labor a like release to the end that all laborers, material men or contractors will look solely to the

Buyers and their interest in the property for the payment and will waive any right or claim that they may have against said Sellers or the property herein described owned by them.

9. The said Sellers agree that they will forthwith, upon the signing of this agreement, post or cause to be posted proper notices in conspicuous places upon said property, notifying all persons employed thereon or who furnish material and supplies to the said Buyers therefor that neither said property nor said Sellers will be liable for same or will said property be liable for lien therefor.

10. The said Buyers agree that they will not commence any work upon said property nor order any material therefor until said notices have been posted and that thereafter they will maintain said notices or cause same to be maintained at all times that they are in possession of or are operating said property, and should the said Buyers commence work before said notices are posted or perform any work upon said property while said notices are not maintained thereupon, this agreement shall immediately terminate and cease at the option of the said Sellers.

[26]

11. The said Buyers agree to comply strictly with the Workmen's Compensation or Industrial Insurance Act of the State of California providing casualty insurance for all workmen injured while employed by them in the exploration and development of said mining claims or for any other work

performed by the said Buyers or at their instance during the term of this agreement.

12. After said shaft has been sunk to the intersection of the vein and drifted on for a distance of not less than two hundred (200) feet, if by that time sufficient tonnage of commercial ore is in sight to justify a mill, and, if not, as soon as sufficient tonnage of commercial ore is in sight, the said Buyers agree to build a suitable mill and mill buildings and to install proper milling machinery for the economical and proper milling of said ore and to proceed without delay in a minerlike fashion to mine, mill and market said ores which have

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developed on said property by the operation of said Buyers but especially excepting therefrom all ores hereinbefore referred to in the mine and on the dump as hereinbefore described.

13. The said Buyers expressly agree to impound all mill tailings which assay over One ($1.00) Dollar per ton to the end that they will be preserved for future treatment.

14. It is understood and agreed by the parties hereto that after the said sinking, drifting and building of a suitable mill are completed and the mine is put on production that Five ($5.00) per ton is to be allowed to the said Buyers to cover the cost of all mining, milling and marketing and that the Sellers shall receive the balance over Five ($5.00) Dollars per ton, which amount shall be

applied as received upon the [27] purchase price of said property until it is paid for in full.

Should the Buyers mine and mill any ore which returns less than Five ($5.00) Dollars per ton net, they shall pay all of the costs thereof over and above the net returns received and this shall not be a charge against the Sellers or against any future returns which they are entitled to receive.

In consideration of the foregoing conditions and the expenditures to be made and the work to be done hereunder by the said Buyers, and in consideration of their faithfully keeping of all of the covenants herein contained, the said Sellers hereby give to the said Buyers the right to purchase all of the above described property for the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, payable as follows: One Thousand ($1,000.00) Dollars on or before August 1, 1932; One Thousand ($1,000.00) Dollars on or before November 1, 1932; One Thousand ($1,000.00) Dollars on or before January 1, 1933; One Thousand ($1,000.00) Dollars on or before March 1, 1933; One Thousand ($1,000.00) Dollars on or before May 1, 1933; One Thousand ($1,000.00) Dollars on or before July 1, 1933; One Thousand ($1,000.00) Dollars on or before September 1, 1933; One Thousand ($1,000.00) Dollars on or before November 1, 1933; One Thousand ($1,000.00) Dollars on or before January 1, 1934; One Thousand ($1,000.00) Dollars on or before March 1, 1934; and One Hundred Forty Thousand ($140,000.00) Dollars on or before five (5) years

from date hereof, it being understood and agreed that all amounts paid by the said Buyers under the terms of this agreement shall be applied to and credited upon the several installments of the purchase price as they mature and as hereinbefore provided, and that in case said sums shall amount

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to the full purchase price of said claims to be paid, as hereinbefore provided prior to the expiration of the term of this agreement, or upon full payment of said installments, to the said Sellers, according to the terms of this agreement, then the said Sellers shall execute a good and sufficient deed conveying to the [28] said Buyers all their right, title and interest in and to the lode mining claims, to the water and right of way for flume hereinabove particularly referred to, clear of all encumbrances suffered or permitted by them.

The Buyers may proceed at their own expense to patent at any time they deem advisable any of the unpatented claims of said group in the name of the Sellers. The Sellers agree to cooperate and assist in obtaining such patents.

Time is the essence of this agreement, and it is expressly agreed that in case of any violation by the Buyers of any covenant herein contained, or upon their failure or refusal to carry out or comply with all of the terms and conditions of this agreement (labor strikes, injunction proceedings, or other outside interference, except weather, over which

said Buyers have no control excepted), the Sellers, at their election, may terminate this agreement.

In the event of a default by the said Buyers in performing any of the conditions or covenants herein set forth or should said Buyers default in making any of the payments herein provided for at the times and in the manner specified, the Sellers may, at their option, give notice to said Buyers of the termination of this agreement by depositing such notice in the United States Mail, registered and postage prepaid, addressed to the said Buyers at the mine and at the last known post office address given to said Sellers by said Buyers, and the depositing of said notices and the affidavit by the Sellers or any of them that same have been deposited shall be conclusive proof that the notices were given, and this agreement shall be terminated thereby at the option of the said Sellers.

In the event of a default by the Buyers in the performance [29] of some covenant or condition in itself immaterial and of which default they may be unaware, the Sellers, before giving the notice as above set forth, will notify the said Buyers of the

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default complained of and shall allow them thirty (30) days from the date of giving said notice in which to cure same and remedy said default or defaults so complained of.

In the event of the termination of this agreement by default the said Buyers shall have no claim against the Sellers of any kind or nature or compen-

sation for any labor performed, expenses incurred or services rendered in connection herewith or hereunder, and all machinery, tools and appliances, fast or loose, placed upon said property by them or under this agreement shall remain upon said property as a part thereof and become the property of the said Sellers.

It is understood and agreed that the said Buyers shall have the use of all buildings, machinery and equipment now on said premises but in the event of the termination of this agreement same are to be left in as good repair as they now are; necessary and usual wear and tear excepted.

It is agreed that the said Buyers will not record this agreement until they have paid at least Ten Thousand ($10,000.00) Dollars thereon, and should said agreement be recorded by them or by any one for or under them prior to the completion of the payments to the amount of Ten Thousand ($10,000.00) Dollars, such recordation shall, at the option of the said Sellers, immediately terminate this agreement and this option shall be evidenced by the recordation of the declaration of such intention or desire by the said Sellers.

All payments to be made to the said Sellers by the said [30] Buyers hereunder shall be made to their order at the Citizens National Trust and Savings Bank of Los Angeles.

This instrument shall be binding upon the heirs, assigns and successors of the respective parties

hereto but before the said Buyers shall assign same they will notify the said Sellers of such intention and at the time of such assignment will obtain for the Sellers in form satisfactory to them a written agreement in which their assignees accept the same responsibility as the Buyers have hereunder, and said Buyers shall not be relieved from their liability hereunder even in event of an assignment unless specific consent thereto is given in writing by the said Sellers.

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In event of the insolvency of the Buyers or of their successors and assigns, or in the event that proceedings in involuntary bankruptcy are brought against them, said Sellers may, at their option, terminate this lease.

In Witness Whereof the parties hereto have hereunto set their hands and seals the day and date first above written.

CHANDIS SECURITIES COMPANY

By (Signed) HARRY CHANDLER,
President.

(Signed) M. N. CLARK

(Signed) ALICE CLARK RYAN
Sellers.

(Signed) RUSSELL F. COLLINS

(Signed) BEN L. COLLINS
Buyers. [31]

State of California,
County of Los Angeles—ss.

On this 13th day of July A.D., 1932, before me, Rose B. Coidarrens, a notary public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Harry Chandler, known to me to be the President of Chandis Securities Company, the corporation described in and which executed the above instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Signed) ROSE B. COIDARRENS

My commission expires February 8, 1935.

State of California,
County of Los Angeles—ss.

On this 13 day of July, A.D., 1932, before me, Rose B. Coidarrens, a notary public in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared M. N. Clark, Alice Clark Ryan, Russell F. Collins and Ben L. Collins, known to me to be the persons whose names are subscribed to the above instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

(Signed) ROSE B. COIDARRENS

My commission expires Feb. 8, 1935. [32]

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Exhibit "2"

Supplemental Agreement

Referring to that certain agreement of sale made July 13, 1932, by and between the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, of Los Angeles, California, hereinafter described as the Sellers and Russell F. Collins of Seattle, Washington and Ben L. Collins, of Spokane, Washington, hereinafter designated as the Buyers, in which the Sellers agree to sell to the Buyers that certain mining property located in Mono County, known as the Lob Cabin property, more particularly described in said agreement which is hereby made a part hereof, said parties agree to and with each other to modify same as follows:

Whereas on page 4, paragraph 4 of said agreement, the Buyers agreed, among other things, to sink the existent vertical shaft from a depth of 125 feet to a total depth of 250 feet or to the point of its intersection with the vein, and

Whereas in the sinking of said shaft the Buyers encountered sufficient water to make the pumping thereof very expensive, and

Whereas they are desirous of substituting other worth therefor, and propose, in lieu of the sinking of said shaft to the said depth, that they run an adit level, which they believe will be not less than 1200 feet in length, from the surface to said vein at or near the point where it would be intersected by said shaft and at a depth to where it will strike the ledge not less than said 250 feet in depth from the surface, and

Whereas the said Sellers are agreeable to this substitution,

Now, Therefore, in consideration of the agreement of said Buyers, and their successors in interest, the Mutual Gold Corporation, that they will run said adit level in accordance with [33] all of the general terms as set forth in said original contract, the Sellers hereby consent that said original contract shall be amended so as to permit the running of said level instead of the sinking of said shaft, and further agree that the Buyers may sink what is known as the North winze on the vein as far as they desire to sink same.

The work upon said adit level shall be carried on upon the same terms and conditions as to the amount of work to be performed as applied to the

sinking of the said shaft.

The sellers agree also that in event the Buyers run the completed adit level as agreed to the point where it intersects said vein that they will extend the time of said contract of July 13, 1932, for an additional period of nine (9) months.

Whereas, further, the Buyers have erected a mill upon said property in the anticipation of the completion of said shaft by or before this time, and

Whereas, further, they are desirous of operating said mill for the purpose of testing same and for the purpose of determining its adaptability to save the values contained in the ore from said property, and

Whereas, under the existing contract of July 13, 1932, they do not have the privilege of milling ore except as therein provided.

Now Therefore, in consideration of the premises and of the covenants and agreements in this modification contained, the said Sellers agree that when desired by the Buyers and on reasonable notice from them in order to enable the Sellers to send a representative to supervise this work, that the Sellers will allow the Buyers to mill enough ore from said property to [34] test said mill but not to exceed an amount, however, necessary to produce gold to the value of approximately $1000.00, and the Buyers will pay the cost of such representative, which cost shall be his actual expenses and not to exceed $10.00 per day for such time as he puts in on the property.

In consideration of the above, the Sellers agree

to the substitution of the work of running the adit level to the intersection of the vein in lieu of the sinking of said shaft and the Buyers agree to perform said work in accordance with all of the terms of said contract, which it is agreed between the parties hereto is modified only to the extent of this Supplemental Agreement and otherwise shall remain in full force and effect.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the 28th day of April, 1934.

CHANDIS SECURITIES COMPANY
(Signed) HARRY CHANDLER
President.

M. N. CLARK
ALICE CLARK RYAN
Sellers.

RUSSELL F. COLLINS
BEN L. COLLINS
Buyers.

MUTUAL GOLD CORPORATION
By RUSSELL F. COLLINS
President
Successors in interest to the Buyers.

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[35]

Exhibit "3"

This Agreement, made and entered into this 29th day of August, 1936, by and between Mutual Gold Corporation, a corporation, party of the first part, and J. A. Vance, party of the second part, Witnesseth:

That Whereas, the party of first part is contemplating the raising of approximately the sum of $30,000 to place its mining property, located near Mono Lake, California, in operation; and

Whereas, the party of the second part has agreed to assist in the raising of said amount to the extent which he has heretofore advised the board of directors of the party of the first part; and

Whereas, the party of the first part has agreed, if said fund is raised, the party of the second part shall serve as general manager under certain terms and conditions; now, therefore,

It Is Agreed as follows, to-wit:

That the party of the second part is hereby employed as general manager of the party of the first part, with full and complete authority for and on behalf of the party of the first part to expend the sum of $30,000 to place the mine of the party of the first part in production and to pay such obligations which shall have been incurred by the company in connection with said property during the months of August and September, 1936.

That the party of the second part shall remain as general manager of the property of the first part

after the said mine shall have been placed in production and during the operation of said mine until such time as the said sum of $30,000 shall have been fully repaid to parties advancing said funds to the [36] party of the first part, in accordance with the terms of such agreement as shall be made by first party with parties advancing said funds.

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That the party of the second part shall serve without any compensation whatsoever, except that he shall be entitled to full reimbursement for all expenses which he shall incur in connection with his position as general manager, which said expenses shall be paid monthly.

That party of the second part shall employ M. J. Keiley as a mining engineer upon said property if he is able to make satisfactory arrangements with him; but if not, party of the second part shall have the right to employ such mining engineer as he may select with the approval of the board of directors of the first party.

That in the event of the death, resignation or inability of the party of the second part to act as the general manager, those subscribing for the said sum of $30,000 shall have the right to designate a new general manager and the party of the first part agrees to employ such general manager as may be designated; and in connection with the designation of such general manager, if those raising said funds are unable to agree in the selection of the general

manager, those advancing a majority in amount of the funds shall have the right to designate the new general manager to be appointed in the place and stead of the said party of the second part.

That the said funds so raised for the purpose of placing the said mine in production shall be placed in a special fund of said corporation and may be withdrawn only upon the check of the party of the second part for and on behalf of said [37] corporation, or such other party as the party of the second part may designate; but in the event the party of the second part shall designate any other person, except G. F. Ferbert or such other party as may be suitable to first party, to withdraw said funds, the party of the second part shall be responsible for the withdrawal thereof.

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That the party of the second part shall incur no personal liability for any matter or thing whatever which he may do for and on behalf of this corporation while acting under the terms of this contract, and as general manager of said corporation, and shall incur no personal liability for any contracts or obligation which he may incur for and on behalf of the party of the first part, while acting as general manager of the party of the first part, nor shall second party be liable for any mistakes or errors in judgment or any omissions of any character while acting as general manager of first party as herein provided.

In Witness Whereof, we have hereunto set out hands and seals the day and year in this instrument first above written.

MUTUAL GOLD
CORPORATION

By J. E. STIEGLER, President

Attest: E. FUSON, Secy.

First Party

J. A. VANCE

Second Party

The foregoing contract is hereby approved by the following as directors of Mutual Gold Corporation, a corporation:

J. E. STIEGLER
W. L. GRILL
RUSSELL F. COLLINS
J. A. VANCE
R. P. WOODWORTH
FRED P. FREEMAN [38]

EXHIBIT "4"

Referring to that certain agreement made the 13th day of July, 1932, by and between the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, therein designated as the Sellers in which agreement said Sellers agree to sell to Russell F.

Collins and Ben L. Collins, designated therein as the Buyers, that certain property known as the Log Cabin Mines situated in Mono County, California, and more particularly described in said agreement, which said agreement for the purposes herein is hereby made a part hereof, and which said agreement was, with the consent of the Sellers, assigned to and assumed by Mutual Gold Corporation: and;

Referring to that certain Supplemental Agreement made April 28, 1934, by and between the same parties.

The same are hereby modified and amended as follows this 9th day of October, 1936.

For and in consideration of the undertaking and agreement by the Mutual Gold Corporation, the assignee of said Buyers to spend upon said property the additional sum of Thirty Thousand ($30,000.) Dollars under the direction of said Mutual Gold Corporation, as hereinafter set forth, the Chandis Securities Company and Alice Clark Ryan, for herself and as assignee of M. N. Clark, hereby agree to and with the Mutual Gold Corporation to modify said agreement as follows:

The Sellers will allow to the corporation the sum of Eight ($8.00) Dollars per ton to pay the expenses of mining and milling all ore taken out in development work below the ore reserved in the contract of July 13, 1932, down to the drifts existing on that date, approximately one hundred Twenty Five (125) feet below the collar of the present

main working shaft and within the extreme North and South faces as they existed on the 13th [39] day of July, 1932, provided that this work consists of raises and levels and that the raises are not closer to each other than two hundred (200) feet and the levels are not closer than one hundred (100) feet to each other, and

Provided further, that all receipts in excess of Eight ($8.00) Dollars per ton from mining and milling of said ores from this work shall be paid to the Sellers to apply upon the purchase price

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hereunder, and under said original contract of July 13, 1932, and

Provided further, that the corporation may, as provided in the original contract, mill any other ore outside of the herein described area, and should said corporation mill or mine any such, the allowance for mining and milling thereof shall be the same as set forth in the original contract, to-wit, Five ($5.00) Dollars per ton and that all excess over and above these amounts shall be paid to the Sellers as provided in said contract, and

Provided further, that said Corporation shall not mill any of the ore prohibited in the original contract without the additional written consent of the Sellers being first had and obtained, and

Provided further, that should the aggregate of these payments not amount to the sum of Ten Thousand ($10,000.00) Dollars on or before Novem-

ber 1, 1937, that the Corporation shall make up any such deficit, and

Provided further, that should said payments from the milling and marketing of ores as aforesaid not amount to Ten Thousand ($10,000.00) Dollars for the years ending November 1, 1938, November 1, 1939, and November 1, 1940, that the Corporation will in like manner make up such deficit on account of the pur- [40] chase price so that the Sellers will receive the minimum sum of Ten Thousand ($10,-000.00) Dollars during each of said years, and

Provided further, that the remainder of the purchase price shall be payable on or before November 1, 1941.

The Corporation warrants to the Sellers, as a partial consideration for this amendment, that it has on deposit Fifteen Thousand ($15,000.00) Dollars in the Old National Bank At Spokane, Washington, which money can be drawn only upon the order of J. A. Vance, its general manager, and only for the purpose of carrying on the work aforesaid, and that it has Fifteen Thousand ($15,000.) Dollars more subscribed for this purpose which will be available upon ten (10) days' call to be used for the same purposes and in the same manner, and that the expenditures of said total of Thirty Thousand ($30,000.00) Dollars for the purposes as herein set forth, to-wit, mining, milling and developing said property by the Mutual Gold Corporation

under the advice and supervision of capable management is guaranteed by said Corporation.

Should the Mutual Gold Corporation fail to keep any and all of the provisions of this modification agreement, the Corporation may, at its option, terminate same by giving notice to the Sellers of its desire so to do, in which event said original agreement shall stand in all respects as though this modification agreement had not been made.

CHANDIS SECURITIES COMPANY

By HARRY CHANDLER

And

ALICE CLARK RYAN

Sellers

Accepted this 10th day of October, 1936.

MUTUAL GOLD CORPORATION

By J. A. VANCE,

V. Pres. [41]

EXHIBIT "5"

PRODUCTION CERTIFICATE

No. ..... $.....

For value received, the undersigned, a Washington Corporation, agrees to pay to ..... the sum of ..... Dollars, without interest, out of net production receipts accruing from the sale of ores from its mining prop-

erty, before any dividends shall be declared or paid by it upon its capital stock, and in no other manner whatsoever, except that in case of a voluntary or involuntary sale of its mining property, any balance unpaid hereon shall be paid out of the proceeds thereof before any distribution shall be made to its stockholders.

"Net Production Receipts" hereinbefore referred to shall be construed to mean such receipts as shall remain after deducting therefrom all of the costs of producing, handling and milling said ore, necessary corporation expenses and taxes, a reasonable sum for mine development, such sum as the Board of Directors shall determine may be necessary for the purchase and/or payment of necessary mining equipment, and payments on account of the purchase price of said mining property by royalty or otherwise.

All sums which the undersigned shall have for the retirement of this and similar certificates shall be applied pro-rata upon the same.

The execution of this certificate has been authorized by resolution of the Board of Directors.

Dated this ..... day of January, 1938.

MUTUAL GOLD CORPORATION

By .....

Vice President

Attest:

.....

Secretary [42]

EXHIBIT "6"

Memorandum of Agreement between Mutual Gold Corporation organized under the laws of the State of Washington, with its principal place of business at Spokane, and operating solely near Leevining, Mono County, California, hereinafter called the Seller, and Frank A. Garbutt, of Los Angeles, hereinafter called the Buyer, Witnesseth

The Seller, through its duly authorized representatives, states to the Buyer that it requires further equipment to make said property properly profitable as follows:

1.	Bringing in electric power from Leevining or Tiago Lodge, 2½ miles	$11,000.00
2.	Electric Hoist complete with motor and starter, etc.	7,000.00
3.	Cage or skip and mine cars	1,500.00
4.	Ball Mill, 100 tons capacity, including motor, etc.	7,000.00
5.	Classifier complete	3,000.00
6.	Cyanide equipment, including tanks, motor and equipment capable of handling 100 tons daily	25,000.00
7.	6 inch pipe line, 5000 feet and installation thereof, to carry tailings to impounding dam	3,000.00
8.	500 cubic foot compressor, with motor, etc.	4,000.00
9.	Additional building to house new machinery, including coverage for cyanide tanks	3,000.00
10.	New bunkhouses and addition to cook house	1,500.00
11.	Assay office and equipment	1,000.00

12.	Enlargement of present ore bins at shaft and mill	1,000.00
13.	Payroll, truck hauling, cement, sand, etc. for 60 days during installation of above	10,000.00
14.	Payment due on property Nov. 1, 1938	10,000.00
	Total	$84,000.00

[43]

The Seller and Buyer agree to cooperate in investigating and determining whether more suitable milling equipment than that above described and recommended by the Seller can be obtained and if, in the opinion of the Buyer, such proves to be the case, he may, at his option, alter the specifications of the milling equipment accordingly.

The Seller agrees to sell to the Buyer and to forthwith transfer to him the contract owned by it dated July 13, 1932, with the Chandis Securities Company, M. N. Clark and Alice Clark Ryan for the purchase of the Log Cabin Mine and the group of mining claims contiguous thereto, subject to all modifications of said contract, which contract and its modifications are, for purposes of description and otherwise, hereby made a part hereof; included in this sale are all other property, personal and real, belonging to the Seller now on or adjacent or tributary to, or used in connection with said Log Cabin Mine and its group.

The Seller agrees to forthwith transfer its title to said property, real and personal, to Frank A. Garbutt.

In consideration of this agreement and the transfer above set forth, the Buyer agrees to do the following things:

1. Furnish $10,000. to make the payment due the owners of the Log Cabin Mine November 1st, 1938, before its due date.

2. Organize as soon as possible a corporation of such capital stock as he may desire and forthwith transfer to said corporation all titles received by him hereunder as soon as said Corporation is qualified to hold same, issuing all of its Capital Stock fully paid therefor.

As a part of the consideration for the transfer of said title to it, such corporation shall contemporaneously therewith or immediately thereafter agree that it will not sell or part [44] with the title to any real estate referred to herein nor any part thereof, without either (a) the written consent of the Seller herein; or (b) the vote of a majority of the directors of the corporation duly authorized or approved by its stockholders; or (c) its bankruptcy; or (d) a two-thirds vote of its stockholders; and the By-laws will carry a clause substantially setting forth this condition in the language above and that this provision of the By-laws shall not be amended except by the vote of sixty (60%) per cent of the outstanding stock or a unanimous vote of the entire board of directors.

3. Forthwith transfer one-half of its total authorized Capital Stock less one controlling share,

to the Seller, which stock shall carry with it the right to a full minority representation on the Board of Directors of the corporation to be formed.

4. Furnish additional funds to a minimum of $100,000, including the above mentioned $10,000. to said corporation to be formed, as needed by it to equip said Log Cabin Mine with a mill of an estimated capacity of one hundred (100) tons daily or more, a suitable hoist and to bring in electrical power, and for such other equipment and supplies as appear advisable, including payment of taxes and the protection of titles.

5. Take care of all further payments falling due to the owners of said Log Cabin Mine group amounting to $120,000. in all.

6. Proceed with the work of properly equipping said property as rapidly as conditions will permit unless prevented by weather, strikes or other circumstances not controlled by the Buyer.

7. At the Buyer's option to advance additional funds should [45] such advances, in the opinion of the Buyer, become necessary or advisable.

8. Furnish the Seller with proper and detailed monthly statements of the operations of the Corporation to be formed.

9. The Buyer agrees to cooperate with the Sellers in any reasonable way in protecting its and its stockholders' interest in order that the smallest shall receive benefits proportionate to the largest.

For all advances made by him the Buyer shall

be entitled to be repaid out of any profits or funds available from the operation of said property or sale or other disposition of the property, but not otherwise.

When the Buyer has performed all acts hereinabove set forth which are obligatory hereunder he shall be deemed to have fulfilled this contract and his liability shall cease.

The Buyer may also terminate his liability hereunder at any time after furnishing the first $10,000 specified herein by notifying the Seller of his desire so to do and by placing his fifty (50%) per cent of the stock plus the one controlling share obtained by the Buyer hereunder, in escrow with the Title Insurance and Trust Company or with any responsible bank selected by the Buyer with irrevocable instructions to deliver it to the Seller whenever and as soon as the money from net profits or from its dividends or from the Seller sufficient to repay the Buyer has been received by the trustee for the benefit of the Buyer. And should the Buyer (or, in event of his death, his estate) fail from any cause to perform his part of this agreement he hereby agrees to deposit said stock in escrow in the same manner as in this paragraph provided and under the same terms and conditions as though the Buyer were terminating [46] his liability. Should said Buyer withdraw as above or fail to perform his agreement as above provided, the Seller shall have the right to elect a majority of the

board of directors, and such board shall have the right to immediately elect new officers, both conditioned upon (a) the repayment to the Buyer of the monies advanced by him, or (b) the securing of same by a first lien upon the assets of the corporation subject only to its contract of purchase of July 13, 1932, or, at the option of the Buyer he may elect at any time before or while said stock is in escrow to accept in full payment for all money advanced by him such pro rata of said stock as said advances bear to one hundred thousand dollars. While the Buyer retains such control he agrees to vote upon all matters arising as appears to the best interests of the corporation.

It is the intention of both the Seller and Buyer that in event of such withdrawal by the Buyer he shall be entitled to the return of his advances out of profits only or out of funds derived from the sale of said property or from the sale of the stock obtained by the Seller hereunder should the Seller sell the property or stock to third parties after having obtained title thereto by reason of the withdrawal of the Buyer.

This right to repayment shall extend only for such advances as are made in accordance with this contract and the Buyers herein shall not be entitled to repayment for any further or additional advances unless or until he has secured the written approval of the Seller thereto. In computing net profits actual operation expenses only shall be con-

sidered and no charge shall be made on account of officers' salaries, interest or capital expenditures.

[47]

While such stock is in escrow it shall be voted by the Buyer, and its dividends shall go to the Buyer until his advances have been repaid and any dividends received by him shall apply upon such repayment.

The Buyer or his representatives, will consult at all reasonable times with the Seller before making any unusual or extraordinary outlays not contemplated herein and further agrees, insofar as his control of the enterprise is concerned, to use his best judgment in carrying on the operations contemplated.

In witness whereof the said Seller has hereby caused its name to be subscribed by its President thereunto duly authorized by its board of Directors this 2nd day of September, 1938, and its official seal to be affixed, and the said Buyer has hereunto subscribed his name and affixed his seal as of the date aforesaid.

MUTUAL GOLD CORPORATION

By J. E. STEIGLER

FRANK A. GARBUTT [48]

EXHIBIT "7"

MINING DEED

This Indenture, Made this 21st day of September, A.D. 1938 between Mutual Gold Corporation, a corporation authorized to do business in the State of California as a foreign corporation of the County of ..... and State of ..... party of the first part, and Frank A. Garbutt of the County of Los Angeles and State of California, party of the second part, witnesseth:

That the said party of the first part, for and in consideration of the sum of One and no/100ths ($1.00) and other valuable considerations Dollars Gold Coin of the United States, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has Granted, Bargained, Sold, Remised, Released, and forever Quitclaimed, and by these presents does Grant, Bargain, Sell, Remise, Release and forever Quit-Claim unto the said party of the second part, his heirs and assigns, the following lode mine claims as located, surveyed, recorded and held by said part... of the first part, Log Cabin, Log Cabin #1, Log Cabin #2, Log Cabin #3, Log Cabin #4, Log Cabin #5, Log Cabin #6, Log Cabin #7, Log Cabin #8, Millsite, New Year #2, Federal #1, Federal #2, Log Cabin Annex, Tamarack, Oro, Burke Fraction, Summit Extension, Summit Extension #1, Summit Extension #2, Summit Extension #3, Summit Extension #4, Summit Extension #5, Lakeview, Lakeview #1, Lakeview #2, Lakeview #3, Gunsight, Gun-

sight #1, Gunsight #2, Gunsight #3, Timber Slope, Contact, Contact #1, Mutual Gold Lode, Mutual Gold Lode #1, Dome and Dome #1. in ..... Mining District, Mono County, State of California, together with all the dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock and earth therein, and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the [49] tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, his heirs and assigns forever.

In testimony whereof, the said party of the first part has hereunto set its hand and seals the day and year first above written.

Signed, sealed and delivered in the presence of

MUTUAL GOLD CORPORATION,
a corporation
By J. E. STEIGLER,
President

Attest:

E. FUSON,
Secretary

State of Washington,
County of Yakima—ss.

I, the undersigned, a notary public in and for the above named County and State, do hereby certify that on the 22 day of September, 1938, personally appeared before me, J. E. Stiegler, to me known to be the President of the Corporation that executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and he on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

(Notarial Seal)

A. M. OTTO

Notary Public in and for the State of Washington, residing at Natches. [50]

EXHIBIT "8"

ASSIGNMENT OF CONTRACT

Know all men by these presents that in consideration of the sum of One Dollar and other valuable considerations in hand paid, receipt of which is here-

by acknowledged, Mutual Gold Corporation, a corporation, authorized to do business as a foreign corporation in the State of California, do hereby sell, assign, transfer and set over unto Frank A. Garbutt all of its right, title and interest in and to that certain contract dated July 13, 1932, between Chandis Securities Company, M. N. Clark and Alice Clark Ryan as the Sellers and Russell F. Collins and Ben L. Collins as the Buyers, together with all modifications and agreements supplemental thereto.

In witness whereof the assignee herein hereunto sign same by its duly authorized officers and affixes the corporate seal the day and year first above written Sept. 21, 1938.

MUTUAL GOLD CORPORATION,
a corporation

By J. E. STEIGLER
President

Attest:

E. FUSON
Secretary

State of Washington,
County of Yakima—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this ..... day of September, 1938, personally appeared before me J. E. Steigler to me known to be the President of the corporation that

executed the within and foregoing instrument and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and he on oath stated that he was authorized to [51] execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

A. M. OTTO

Notary Public in and for the State of Washington, residing at Natches. [52]

EXHIBIT "9"

BILL OF SALE

Know all men by these presents, that Mutual Gold Corporation, a corporation, authorized to do business in the State of California, as a foreign corporation, the party of the first part, for and in consideration of the sum of One and no/100ths ($1.00) and other valuable considerations Dollars, to it in hand paid by Frank A. Garbutt the party of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, his executors, administrators and assigns, the following described personal property,

located and being in County of Mono, State of California, to-wit:

All of the mining machinery, tools and equipment of every kind and character belonging to the party of the first part, together with all supplies of every nature belonging to said first party, also the following automotive equipment:

One Chevrolet 1½ ton truck, Motor #T-3783707
One Chevrolet 1½ ton truck, Motor #T-4480353
One Dodge 3 ton panel body truck Motor #GB-20184, Ser. #113491
One Ford Closed Cab pick-up truck Motor #1391644

To have and to hold the same to the said party of the second part, his executors, administrators and assigns, forever.

And Mutual Gold Corporation, a corporation does for its heirs, executors and administrators, covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant and defend the sale of such property, goods and chattels hereby made unto the said party of the second part, his executors, and assigns, against all and every persons whomsoever, lawfully claiming or to claim the same. [53]

In testimony whereof, we have hereunto set our hands and seals the 22 day of Sept. in the year of our Lord, one thousand nine hundred and 38.

(Cor. Seal)

MUTUAL GOLD CORPORATION,
a corporation

By J. E. STEIGLER
President

and

E. FUSON
Secretary

Signed, Sealed and Delivered in presence of

.....

State of Washington,
County of Yakima—ss.

On this 22 day of September, 1938, before me, a Notary Public in and for the above named County and State, personally appeared J. E. Steigler to me known to be the President of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] A. M. OTTO

Notary Public in and for the State of Washington, residing at Natches.

No. 988 State of California
County of Mono—ss.

Filed for record at request of David E. Hinckle on the 7th day of Nov. 1938 at 55 minutes past 9 A. M.

GEO. C. DELURY, JR.,
County Recorder
By GRACE J. BRANDON
Deputy

Recorded in Book 14, page 322, Official Records.

[54]

Exhibit "10"

Los Angeles, Cal., Oct. 31, 1938

Mutual Gold Corporation:

Referring to that certain contract entered into with you on September 2, 1938, and again upon September 22, 1938 I hereby withdraw from same as it is therein provided that I may do and I also elect to, and do hereby terminate my liability thereunder.

I have fully performed my part of said contract to date and admit and agree that you likewise will have wholly performed said contract on your part as soon as you give me the security contemplated therein.

If you are in accord, I suggest that, in addition to this formal notice which terminates said contract, we enter into the following agreement to terminate same by mutual consent.

FRANK A. GARBUTT

Receipt of the foregoing notice is hereby acknowledged and accepted as of the date hereof, October 31, 1938.

MUTUAL GOLD
CORPORATION
By W. L. GRILL
G. H. FERBERT

This Agreement Made this 1st day of November, 1938, by and between the Mutual Gold Corporation, a corporation organized under the laws of the State of Washington, the Party of the First Part, and Frank A. Garbutt, of Los Angeles, California, the party of the Second Part, Witnesseth:

That For and in Consideration of the sum of $10.00 mutually in hand paid, the receipt of which is hereby acknowledged, and [55] in consideration of the mutual promises and agreements hereinafter contained, the parties hereto do hereby agree to and with each other as follows, to-wit:

1. Both parties agree that the certain contract entered into by them on September 2 and September 22, 1938, is hereby by mutual consent, abrogated, terminated and ended as fully and completely as if it had never been entered into and that the same is and shall be of no further force and effect, and that neither party thereto shall hereafter take any benefit or benefits therefrom or incur any liability thereunder, thereby or therefrom, and each of the parties hereto, hereby releases the other from any claim or claims thereunder of every name or nature whatsoever.

2. The party of the second part has advanced, and contracted with third parties to advance certain sums of money for the benefit of the first party, including $11,000 for the construction of a power line, the purchase of certain machinery, the payment of wages, etc., all of which has been or will be evidenced by proper vouchers or other satisfactory proof.

3. The party of the second part further agrees, upon demand, to advance the additional sum of $10,000 to make a payment falling due to the owners of the Log Cabin Mines and such additional monies as may be necessary to pay for any machinery, material, supplies, labor or other expenditures heretofore made by the party of the second part or hereafter made by him at his option at the request or with the consent of the party of the first part.

4. The party of the first part agrees that, in con-

sideration for the money advanced and the money to be advanced, it will give to the party of the second part its notes, due one day after date, drawing 6% interest until paid, and that the party of the second part may and shall hold title to the real and [56] personal property heretofore conveyed to him by said party of the first part in trust as security for the payment of said notes.

5. The party of the second part hereby acknowledges that he holds the titles to the real estate and personal property heretofore conveyed to him by the party of the first part, in trust for the benefit of said party of the first part but subject to and as security for the repayment to the party of the second part of the monies advanced and to be advanced by him for the benefit of said party of the first part and/or for the benefit of the said property which consists of what is known as the Log Cabin Mines and the machinery, equipment and tools thereon, both fast and loose, which property is more fully described in the documents of transfer heretofore made by the party of the first part to the party of the second part, reference thereto being had and which are hereby made a part hereof for all purposes of this agreement.

6. Should the party of the first part organize or cause to be organized or acquire a Corporation to take over and hold said property in which corporation it owns all of the Capital Stock, the party of the second part will, on demand, transfer said property subject to his claim against it to such corpora-

tion, and accept contemporaneously therewith a pledge of all of its stock as security for his said notes and immediately thereafter, and as soon as possible said party of the first part will execute and deliver to the party of the second part such documents as may be necessary, proper and sufficient to evidence and establish said indebtedness of record.

In Witness Whereof the parties hereto have hereunto set their hands and affixed their seals the year and day first above written.

MUTUAL GOLD
CORPORATION

By W. L. GRILL

And G. H. FERBERT
FRANK A. GARBUTT [57]

EXHIBIT "11"

This Agreement, made and entered into as of the 17th day of December, 1938, by and between Mutual Gold Corporation, organized and existing under the laws of the State of Washington and authorized to do business in California, hereinafter called the Party of the First Part, Frank A. Garbutt, of Los Angeles, California, hereinafter called the Party of the Second Part, and Log Cabin Mines Company, a California corporation, hereinafter called the Party of the Third Part, Witnesseth:

That Whereas, heretofore, to-wit, upon September 2nd and again upon September 22nd the First Party entered into an agreement with Second Party relating to the developing and equipping of the Log Cabin group of mines and mining claims located near Leevining, Mono County, California, and held by First Party under a certain contract to purchase from the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, dated July 13, 1932, together with all existing modifications of said contract, which, with its modifications, is hereinafter designated as the contract, in which the property that is the subject of this agreement is fully described, and which said contract for the purpose of description and for all other purposes of this agreement is hereby made a part hereof; and

Whereas, under said agreements of September 2nd and/or September 22nd the First Party did transfer to Second Party said contract together with all other real property owned and controlled by it in that locality, and all of its machinery, tools and personal property used in connection therewith, (all of said real property and interests therein and said personal property being hereinafter designated as the property); and

Whereas, said transfer, while absolute in its terms, was in trust nevertheless, for the purposes of said agreements of [58] September 2nd and 22nd and particularly for the purpose of facilitating and insuring the transfer of said contract and

said property to a corporation to be formed; and

Whereas, before the formation of such corporation the Second Party elected to withdraw from said contracts of September 2nd and 22nd as therein provided and terminate his liability thereunder and upon October 31, 1938, did in writing, so withdraw, having fully fulfilled his obligations up to the time of said withdrawal; and

Whereas, thereafter, to-wit: upon the 1st day of November, 1938, the First Party entered into an agreement with Second Party agreeing that such withdrawal should be by mutual consent and fixing the status of the parties, which said agreement of November 1 is hereby made a part hereof; and

Whereas, the First Party was reluctant to have the Second Party withdraw and is desirous of continuing the association and the Second Party is willing to do so upon terms offered by First Party which are similar to, and substantially accomplished the same results contemplated in said contracts which have been terminated but in a different way more satisfactory to both of the parties hereto; and

Whereas, First Party is the owner of said contract and said property, subject to future payments to be made to the sellers thereof, and subject to the indebtedness owing to the Party of the Second Part; and

Whereas, First Party is without funds to equip and develop said property and is desirous that the

same be done without any unnecessary delay; and

Whereas, First Party believes that said property should be [59] equipped substantially as follows, at the estimated cost set forth:

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1.	Bringing in electric power from Leevining or Tioga Lodge, 2½ miles	$11,000.00
2.	Electric hoist complete with motor and starter, etc.	7,000.00
3.	Cage or skip and mine cars	1,500.00
4.	Ball mill, 100 tons capacity, including motor, etc.	7,000.00
5.	Classifier complete	3,000.00
6.	Cyanide equipment, including tanks, motor and equipment capable of handling 100 tons daily	25,000.00
7.	6-inch pipe line, 5,000 feet and installation thereof, to carry tailings to impounding dam	3,000.00
8.	500 cubic foot compressor, with motor, etc.	4,000.00
9.	Additional building to house new machinery, including coverage for cyanide tanks	3,000.00
10.	New bunkhouse and addition to cook house	1,500.00
11.	Assay office and equipment	1,000.00
12.	Enlargement of present ore bins at shaft and mill	1,000.00
13.	Payroll, truck hauling, cement, sand, etc. for 60 days during installation of above	10,000.00
14.	Payment due on property November 1, 1938	10,000.00

And Whereas, of the above list the Second Party has heretofore furnished the following items or the money therefor, for which First Party is now indebted, to-wit:

1.	Electric hoist (plus cost of hauling, foundations and installation, at this time unknown)	1,225.00
2.	Power Line	11,000.00
7.	Payments on pipe line (increased to 8-inch)	
8.	Compressor (less hauling, foundations and installation)	1,600.00
		[60]
13.	Payrolls, hauling cement, materials, heaters and other necessary expenses, approximately	3,000.00
14.	Payment due to owners November 1, 1938	10,000.00
	Total, approximately	

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And Whereas, the Party of the First Part owns and controls the Party of the Third Part, the Log Cabin Mines Company, a California corporation, with an authorized capital of $10,000 of a par value of $1.00 per share;

Now Therefore, in consideration of the premises and in consideration of the sum of Ten ($10.00) Dollars mutually in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the promises, covenants and agreements hereinafter set forth, the parties hereto do hereby agree to and with each other as follows, to-wit:

1. The parties of the First Part and Second Part agree to cooperate in investigating and determining whether more suitable equipment than that above described and recommended by First Party can be obtained, and if, in the opinion of the Second Party such proves to be the case, he may, at his option, alter the specifications of such equipment accordingly.

2. First party agrees to purchase for cash all of the capital stock of the Third Party, which has a permit from the Corporation Commission of California to sell the same to First Party.

3. First Party agrees to give and does hereby give to Third Party a firm option to purchase said contract and property for the sum of Ten ($10.00) Dollars and the other benefits herein set forth, subject, however, to any claims, liens or indebtedness owing to Second Party but reserving to First Party [61] from this option the tailings now on a portion of said property below the mill and also reserving from this transfer the surface of the ground upon which said tailings are located and for the purpose of securing this option in event the Third Party exercises same by the majority vote of its Board of Directors, said First Party agrees and does hereby agree, acknowledge and confirm that Second Party holds the titles to said contract and said property, first, as securing the payment to him of all monies advanced or to be advanced by him hereunder and, second, for the purpose of transferring same to Third Party subject to such in-

debtedness if and when Third Party elects to exercise said option.

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4. First Party hereby gives and grants to Second Party a firm option to purchase a majority of the stock, to-wit 5001 shares of the capital stock of Third Party for the total sum of $5001.00 and in order to protect said Second Party in the right to purchase same, First Party has delivered or has authorized the delivery of said 5001 shares of stock into escrow to be delivered to the Second Party if and when he exercises said option and pays the $5001.00 specified to be paid therefor by the payment of $5001.00 to the First Party, or, at the option of Second Party, he may exercise said option by paying or crediting either First or Third Party with said amount of $5001.00 upon any advances heretofore or hereafter made by Second Party for the benefit of either First or Third Party or for the benefit of said property and/or contract. Second Party may exercise said option at any time prior to the termination of this contract and while said stock is in escrow and until Second Party has been repaid in full, he shall vote [62] said stock as herein otherwise provided.

5. Party of the Second Part agrees to loan or advance to the Party of the Third Part from time to time as or before needed, funds to a minimum of Ninety-five Thousand ($95,000.00) Dollars, for the protection and development of said property and

the property covered by said contract, and for equipment, as needed by Third Party to equip said Log Cabin Mine with a mill of an estimated capacity of one hundred (100) tons daily or more, as herein set forth, and/or the payment of its debts incurred by or to Second Party, which said minimum of $95,000.00

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shall include sums for which the Party of the First Part is now obligated to the Party of the Second Part, and which said obligation shall, upon the completion of this contract, and the exercise of the option by the Party of the Second Part to purchase said 5001 shares of stock of the Party of the Third Part, cease to be the obligation of the Party of the First Part, and become the obligation of the Party of the Third Part to the Party of the Second Part; said advances to be repaid with interest at the rate of ten (10%) per cent per annum, but said interest in any event not to total more than Five Thousand ($5,000.00) Dollars, regardless of the time elapsing before the repayment of said advances; and all of said advances, together with said interest, to be payable only out of the first profits or funds available, as and when they accrue and become available from the operations or sale or other disposition of the said Mines, and/or contract and property to be conveyed to and owned by the Party of the Third Part hereunder, but not otherwise to be repaid.

6. That as one of the principal reasons for the

entering [63] into this contract by the parties hereto is the protection of the stockholders and more especially the small stockholders of the First Party, in order that their rights shall be preserved while the property is being developed and placed upon a paying basis for their proportionate benefit, therefore it is further agreed that should the First Party be forced into insolvency or should any creditor or creditors obtain judgment against it or its property which threatens to extinguish the rights of its small stockholders or take their equities from them, then and in such event, anything to the contrary contained herein notwithstanding, the Second Party shall have the option at any time thereafter to declare all monies advanced by him due and payable and proceed to recover the same by due process of law.

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The Second Party agrees:

7. To proceed with the work of properly equipping said property as rapidly as conditions will permit unless prevented by weather, strikes or other circumstances not controlled by the Party of the Second Part.

8. At the option of the Second Party to take care of all further payments to the owners of said Log Cabin Mine group, amounting to $120,000.00 in all which fall due during the life of this agreement.

9. At the option of the Party of the Second Part to advance additional funds over and above

said minimum of $95,000.00 should such advances, in the opinion of the Party of the Second Part, become necessary or advisable.

10. The Party of the Third Part hereby agrees, immediately upon the conveyance of said contract and property to it, to execute and deliver to the Party of the Second Part a first lien [64] upon said contract and property, subject to the balance due the owners upon said contract as security for the said advances of the Party of the Second Part made to the Party of the First Part herein, and all further advances thereafter made by the Party of the Second Part to the Party of the Third Part; and the Party of the Third Part further agrees to execute from time to time such documents as are necessary and proper to assure said liens, together with all renewals thereof which may be required from time to time by the Party of the Second Part.

11. The Party of the Second Part may at any time terminate his liability hereunder by notifying the Party of the First Part and said escrow holder, in writing, that he does not desire to proceed further hereunder, and the liability of the Party of the Second Part to make any further advances hereunder, except for debts heretofore incurred by him for the Party of the Third Part, shall immediately cease and terminate; and in the event of such termination, all of said stock belonging to the said Party of the Second Part in the Party of the Third Part, should he

have exercised his option hereunder to purchase same, shall be held by said escrow holder for the benefit of the Party of the First Part and be delivered to it as soon as and whenever all of the advances theretofore made by the Party of the Second Part shall have been repaid to him, plus the total interest charges hereinbefore set forth and the further payment of One ($1.00) Dollar for the said 5001 shares of the party of the Third Part held in escrow as aforesaid.

12. In the event that the Party of the Second Part shall fail, neglect or refuse to proceed further with the contract or give written notification of his termination of liability here- [65] under, then the Party of the First Part shall have the right to elect a majority of the Board of Directors of the Party of the Third Part and such Board shall have the right to immediately elect new officers of the Party of the Third Part, both conditioned upon the repayment to the Party of the Second Part of the monies advanced by him.

At the option of the Party of the Second Part he may elect at any time before or while said stock is in escrow to accept in full payment for all money advanced by him such pro rata of said stock as said advances and money paid for stock bear to One Hundred Thousand Dollars at which time he may complete said advances then remaining unmade.

13. It is the intention of all of the parties hereto that should the Party of the Second Part withdraw as herein provided or should he fail, neglect

or refuse to proceed further with the contract that he shall be entitled to the return of such advances as he may have made or may make, out of profits only or out of funds derived from the sale of said property or from the sale of the stock obtained by the Party of the First Part hereunder should the Party of the First Part and/or the Party of the Third Part sell the property or stock to third parties after having obtained title thereto by reason of the withdrawal of the Party of the Second Part but notwithstanding such intention and

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in event of such contingencies should the funds derived from the sources above mentioned be insufficient to repay said advances to the Party of the Second Part within the times hereinafter specified, then and in that event the Parties of the First Part and Third Part agree that they will repay to the Party of the Second Part all such advances not in excess of Fifty Thousand [66] ($50,000.00) Dollars within one (1) year and all advances in excess of Fifty Thousand ($50,000.00) Dollars within two (2) years thereafter, or after such withdrawal, anything in this contract to the contrary notwithstanding.

In computing net profits actual operating expenses only shall be considered and no charge shall be made on account of officers' salaries, interest or capital expenditures.

14. This right to repayment shall extend only for such advances as are made in accordance with this contract and the Party of the Second Part herein shall not be entitled to repayment for any further or additional advances unless or until he has secured the written approval of the Party of the First Part thereto.

15. The Party of the Second Part, or his representatives, will consult at all reasonable times with the Party of the First Part before making any unusual or extraordinary outlays not contemplated herein, and further agrees, insofar as his control of the enterprise is concerned, to use his best judgment in carrying on the operations contemplated.

16. That while said 5001 shares of the stock of the Party of the Third Part under option to or belonging to the Party of the Second Part is in escrow, as aforesaid, it shall be voted by the Party of the Second Part and all dividends thereon shall be paid to the Party of the Second Part until his advances have been entirely repaid, and any dividends received by the Party of the Second Part shall apply upon such repayment.

While the Party of the Second Part retains the control he agrees to vote upon all matters arising as appears to the best interests of the corporation.

17. That the capital stock of the Party of the Third Part [67] shall not be increased until all of said advances made by the Party of the Second Part are repaid in full.

18. The Party of the Third Part agrees that it will not dispose of its contract or real property, nor any part thereof, without at least one of the following things as a condition precedent thereto, either

(a) The written consent of the Party of the First Part.

(b) The vote of a majority of the directors of the Log Cabin Mines Company, duly authorized or approved by a two-thirds vote of its stockholders.

(c) The bankruptcy of the said Party of the Third Part.

(d) By the unanimous vote of the entire Board of Directors of the Party of the Third Part, duly approved or authorized by a majority of its stockholders.

19. The Party of the Third Part agrees to furnish the Party of the First Part with proper and detailed monthly statements of its operations.

20. The Party of the Third Part agrees that until the advances made by the Party of the Second Part have been repaid in full and until the owners have been paid in full, it will pay no salaries to its officers and directors, and, in any event, it will pay no salaries, bonuses or other emoluments except for actual work done or services performed at their fair value.

21. The Party of the Second Part agrees that after being secured, as provided in paragraph numbered 10, he will, upon the demand of the Party

of the First Part, forthwith release any and all liens or claims that he has against the 4999 shares of stock belonging to the Party of the First Part in the Party of the Third Part. [68]

22. In the event the Party of the First Part becomes dissatisfied with the manner in which the Party of the Second Part is carrying out this contract it agrees to state to him in

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writing its cause of dissatisfaction and give him ninety (90) days in which to cure same, before taking any action in regard thereto.

23. It is further agreed that the Party of the Second Part incure no personal liability hereunder for errors in judgment or for failure to do any thing or perform any act herein set forth to be done or performed.

In Witness Whereof, the Parties of the First Part and Third Part have caused these presents to be duly executed by their authorized officers and their corporate seals to be hereunto affixed, and the Party of the Second Part has hereunto set his hand and seal, the day and year first above written.

[Seal] MUTUAL GOLD CORPORATION

By J. E. STEIGLER
President

Attest: E. FUSON
Secretary

Party of the First Part.

FRANK A. GARBUTT
Party of the Second Part.

LOG CABIN MINES
COMPANY

By .....
President

Attest: .....
Secretary
Party of the Third Part.

[69]

EXHIBIT "12"

The consideration for this deed is less than a hundred dollars.

Mining Deed

This Indenture, made this 10th day of April, 1939, between Mutual Gold Corporation, a corporation organized and existing under the laws of the State of Washington and authorized to do business in the State of California, party of the first part, and Log Cabin Mines Company, a corporation organized and existing under the laws of the State of California and having its principal place of business in the County of Los Angeles, State of California, party of the second part,

Witnesseth: that the said party of the first part, for and in consideration of the sum of five dollars ($5.00) lawful money of the United States to it in

hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quit-claimed, and by these premises does grant, bargain, sell, remise, release and forever quit-claim unto the said party of the second part, and to its successors and assigns, the following lode mining claims situated in the County of Mono, State of California, as said claims are located, surveyed and recorded:

Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Millsite, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro, Burke Fraction, Summit Extension, Summit Extension No. 1, Summit Extension No. 2, Summit Ex-
[70] tension No. 3, Summit Extension No. 4, Summit Extension No. 5, Lakeview, Lakeview No. 1, Lakeview No. 2, Lakeview No. 3, Gunsight, Gunsight No. 1, Gunsight No. 2, Gunsight No. 3, Timber Slope, Contact, Contact No. 1, Mutual Gold Lode, Mutual Gold Lode No. 1, Dome, and Dome No. 1.

Together with any and all other claims and real properties owned by said party of the first part in said Mono County, and together with all the dips, spurs, and angles, and also all the metals, ores,

gold and silver-bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues, and profits thereof; and also all the estate, right, title, interest, property possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in or to the said premises, and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances, and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

Reserving, However, to the Party of the First Part from this deed the tailings now on a portion of said property below the mill situated on said property, and also reserving from this deed to the party of the first part the surface of the ground upon which said tailings are located.

In Witness Whereof, the said party of the first part has hereunto set its hand and seal, by its proper officers thereunto duly authorized, on the day and in the year first above written. [71]

[Corporate Seal] MUTUAL GOLD CORPORATION

By J. E. STIEGLER,
President

and by C. T. ORR, Secretary

State of Washington
County of Spokane—ss:

I, the undersigned, a Notary Public in and for the above-named county and state, do hereby certify that on this 10th day of April, 1939, personally appeared before me C. T. Orr, to me known to be the secretary of said Mutual Gold Corporation, and they acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and they on oath stated that they were authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] E. D. WELLER
Notary Public in and for the State of Washington, residing at Spokane.

State of Washington
County of King—ss.

I, the undersigned, a Notary Public in and for the above named county and state, do hereby certify that on this 8th day of April, 1939, personally appeared before me J. T. Stiegler, to me known to be the President of the Mutual Gold Corporation, the corporation that executed the within and fore-

going instrument, and he acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and he on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal]

A. B. BOWES
Notary Public in and for the State of Washington, residing at Seattle. [72]

EXHIBIT "13"

Bill of Sale

Know All Men by These Presents, that Mutual Gold Corporation, a corporation, authorized to do business in the State of California and organized and existing under the laws of the State of Washington, the party of the first part, for and in consideration of the sum of five dollars ($5.00) to it in hand paid by Log Cabin Mines Company, a corporation organized and existing under the laws of the State of California, the party of the second part, the receipt of which is hereby acknowledged,

does by these presents grant, bargain, sell, convey and confirm unto the said party of the second part, its successors and assigns, the following described personal property located and being in the County of Mono, State of California:

> All of the mining machinery, tools, and equipment of every kind and character belonging to the party of the first part, together with all supplies of every nature belonging to said first party, and also the following automobile equipment: One Chevrolet one-and-a-half ton truck, Motor No. T-3783707; one Chevrolet one-and-a-half ton truck, Motor No. T-4480353; one Dodge three-ton panel body truck, Motor No. GB-20184, serial No. S113491; and one Ford Closed Cab pick-up truck, Motor No. 1391644.

To have to and hold the same to the said party of the second part, its successors and assigns, forever.

And Mutual Gold Corporation does, for its successors and assigns, covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of said property, goods, and chattels hereby made unto said party of the first part, its successors and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, said party of the first part has, by its proper officers thereunto duly author-

ized, subscribed its name and affixed its corporate seal on this 10th day of [73] April, 1939.

[Corporate Seal] MUTUAL GOLD CORPORATION

By J. E. STIEGLER
President

and by C. T. ORR
Secretary.

State of Washington
County of Spokane—ss.

On this 10th day of April, 1939, before me, a notary public in and for the above named county and state, personally appeared C. T. Orr, to me known to be the secretary of said Mutual Gold Corporation, and *they* acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that *they* were authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] E. D. WELLER
Notary Public in and for the State of Washington, residing at Spokane.

State of Washington
County of King

On this 8th day of April, 1939, before me, a notary public in and for the above named county and state, personally appeared J. E. Steigler, to me known to be the president of Mutual Gold Corporation, the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that [74] he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] A. P. BOWES
Notary Public in and for the State of Washington, residing at Seattle.

No. 157 filed for record at the request of David E. Hinckle Apr. 18, 1939, 30 minutes past 9 o'clock A. M.

GRACE J. BRANDON
County Recorder

Recorded in Book 15, page 31 Official Records.

[75]

EXHIBIT "14"

Mining Deed

This Indenture, made this 21st day of July, 1939, between Frank A. Garbutt of the County of Los Angeles, State of California, a single man, party of the first part, and Log Cabin Mines Cmpany, a corporation organized and existing under the laws of the State of California and having its principal place of business in the County of Los Angeles, State of California, party of the second part.

Witnesseth

That the said party of the first part, for and in consideration of the sum of five dollars ($5.00) lawful money of the United States to him in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has remised, released, and forever quitclaimed, and by these presents does remise, release and forever quitclaim unto the said party of the second part, and to its successors and assigns the following lode mining claims situated in the County of Mono, State of California, as said claims are located, surveyed and recorded.

Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Millsite, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro, Burke Fraction, Summit Extension, Summit Extension No. 1,

Summit Extension No. 2, Summit Extension No. 3, Summit Extension No. 4, Summit Extension No. 5, Lakeview, Lakeview No. 1, Lakeview No. 2, Lakeview No. 3, Gunsight, Gunsight No. 1, Gunsight No. 2, Gunsight No. 3, Timber Slope, Contact, Contact No. 1, Mutual Gold Lode, Mutual Gold Lode No. 1, Dome and Dome No. 1.

Together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant, or therewith [76] usually had and enjoyed; and also all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises and every part and parcel thereof, with the appurtenances.

To have and to hold, all and singular, the said premises, together with the appurtenances and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

Reserving, However, to the Party of the First Part from this deed the tailings now on a portion of said property below the mill situated on said property, and reserving also to said party of the

first part from this deed the surface of the ground upon which said tailings are located.

In Witness Whereof, the said party of the first part has hereunto subscribed his name on the day and in the year first above written.

FRANK A. GARBUTT

State of California
County of Los Angeles—ss.

On this 21st day of July, 1939, before me, Althea K. Hinckle, a notary public in and for said county and state, personally appeared Frank A. Garbutt, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

[Notarial Seal] ALTHEA K. HINCKLE.

My commission expires May 20, 1940. [77]

EXHIBIT "15"

Mining Deed

This Indenture, made this 9th day of August, 1939, between Mutual Gold Corporation, a corporation organized and existing under the laws of the State of Washington and authorized to do business in the State of California, party of the first part, and Log Cabin Mines Company, a corpora-

tion organized and existing under the laws of the State of California and having its principal place of business in the County of Los Angeles, State of California, party of the second part,

Witnesseth:

That the said party of the first part, for and in consideration of the sum of five dollars ($5.00) lawful money of the United States to it in hand paid by the said party of the second part, the receipt of which is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents does grant, bargain, sell, remise, release, and forever quitclaim unto the said party of the second part, and to its successors and assigns, the following lode mining claims situated in the County of Mono, State of California as said claims are located, surveyed, and recorded:

Mutual Gold Lode No. 2, Mutual Gold Lode No. 3, Mutual Gold Lode No. 4, Mutual Gold Lode No. 5, and Mutual Gold Lode No. 6

Together with any and all other claims and real properties owned by said party of the first part in said Mono County, and together with all the dips, spurs, and angles, and also all the metals, ores, gold and silver-bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments,

and appurtenances thereunto [78] belonging, or in anywise appertaining, and the rents, issues and profits thereof; and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the said premises, and every part and parcel thereof, with the appurtenances;

To have and to hold, all and singular, the said premises, together with the appurtenances, and privileges thereto incident, unto the said party of the second part, its successors and assigns forever.

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Reserving, However, to the Party of the First Part from this deed any tailings that may be now on any part of said above-mentioned five claims, and also reserving from this deed to the party of the first part such parts, if any, of the surface of said claims as may have said tailings located thereon.

In Witness Whereof, the said party of the first part has hereunto set its hand and seal, by its proper officers thereunto duly authorized, on the day and in the year first above written.

[Corporate Seal] MUTUAL GOLD CORPORATION,

By J. E. STEIGLER
President

and by C. T. ORR
Secretary

State of Washington
County of Spokane—ss.

I, the undersigned, a notary public in and for the above named county and state, do hereby certify that on this 10th day of August, 1939, personally appeared before me, C. T. Orr, to me known to be the secretary of said Mutual Gold Corporation, and he acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and he on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

[79]

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] E. D. WELLER
Notary Public, residing at Spokane, Wn.

State of Washington
County of Yakima—ss.

I, the undersigned, a notary public in and for the above named county and state, do hereby certify that on this 9th day of August, 1939, personally appeared before me J. E. Steigler, to me known to be the president of Mutual Gold Corporation, the corporation that executed the within and foregoing instrument, and he acknowledged the said instrument to be the free and voluntary act and deed of

said corporation, for the uses and purposes therein mentioned, and he on oath stated that he was authorized to execute said instrument and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year first above written.

[Notarial Seal] A. M. OTTO

Notary Public in and for the State of Washington, residing at Naches.

No. 632. Filed for Record at the request of David F. Hinckle Aug. 17, 1939, 20 minutes past 9 o'clock A. M.

GRACE J. BRANDON
County Recorder.

Recorded in Book 15, page 225 Official Records.

[Endorsed]: Filed Dec. 20, 1939. [80]

[Title of District Court and Cause.]

BILL OF PARTICULARS.

The plaintiffs, in pursuance to the order of court dated February 19th, 1940, hereby furnish the defendants with the particulars requested in, and by, paragraphs 3, 4, 5, 6, 7 and 8 of defendants' demand, to-wit:

First:

In addition to the averments stated in the complaint, and particularly in Paragraphs IX, XV, X and XVIII thereof, allege that the circumstances constituting the frauds which are the basis of this action are:

(a) August 6th, 1938, G. H. Ferbert and Russell F. Collins, who were then directors of Mutual Gold Corporation, attended a meeting of the stockholders of said corporation at Spokane, Washington, and also a directors' meeting on the same day, at which said meetings, with the consent, approval and authorization of Garbutt, they stated and represented to the stockholders and [87] to the directors that said Garbutt was willing to make a deal with Mutual Gold Corporation that was a better deal than the proposal which had been made by Lloyd J. Vance, and which Vance proposal was in substance, to take care, that is provide for the payment of, all the creditors of Mutual Gold Corporation, and develop the mine referred to in the complaint, for a half interest in said mine. Based on said representations of Ferbert and Collins, the directors' meeting was adjourned to meet August 13, 1938 at Seattle, Washington.

(b) Thereupon, and between August 6th, 1938 and August 13th 1938, Ferbert and Collins went from Spokane to Los Angeles, where they met with Garbutt, and returned with a proposal purporting to be made by, and in the name of, Cecil B. DeMille,

but not signed, a true copy of which is attached hereto as Exhibit "A". Said unsigned proposal was, on August 13th, 1938, submitted to, and at, a meeting of the board of directors of Mutual Gold Corporation by Russell F. Collins, G. H. Ferbert and W. L. Grill, at which meeting all of the directors of the company were present. The substance of such proposal was that the said DeMille was willing to agree that if Mutual Gold would execute a transfer of all of its assets to the said Frank A. Garbutt as trustee, to be delivered to the corporation on the completion thereof, he, DeMille, would form a corporation and execute to Mutual Gold Corporation fifty per cent of said stock, less one share, in full payment for all of its assets.

(c) August 16th, 1938, with the knowledge, consent, approval and authorization of said Garbutt, one M. J. Keily went from Los Angeles to Seattle, where he met certain of the directors of Mutual Gold Corporation. Said meeting was private, and the identity of all of the directors attending said meeting with [88] Keily is not known to the plaintiffs, but included J. E. Steigler and W. L. Grill. Following which, and on or about August 16th, or August 18th, 1938, with the knowledge, consent, approval and authorization of said Garbutt, the said W. L. Grill informed the directors, at a board meeting of Mutual Gold Corporation, that it was necessary to make a deal with Garbutt to transfer the assets of Mutual Gold Corporation unto him in order to save and avoid trouble with the owners in

respect to a claim of right by Garbutt, acting for the owners, to forfeit the contract of purchase, Exhibit "1", contained in the complaint.

(d) Thereafter, on or about August 25th, 1938, the said Frank A. Garbutt caused to be issued a notice and claim of forfeiture of said purchase contract, as set out later in this bill of particulars. On or about August 26th, 1938, the said Frank A. Garbutt phoned from Los Angeles to the said W. L. Grill, at the Vance Hotel in Seattle, that he, on behalf of the owners, insisted upon the forfeiture of the purchase contract for alleged breach thereof, and that he, for the owners, would refuse to accept payment in full of the entire purchase price provided to be paid in said contract, all of which was communicated by the said W. L. Grill to the board of directors of Mutual Gold Corporation, at a meeting held about August 27th, 1938, at which meeting Ferbert and Grill were present, and a resolution was adopted by the votes of Ferbert, Hickcox, Steigler and Grill as follows, to-wit:

> Resolved that this corporation accept the offer as embraced in the memorandum of contract prepared and submitted by Frank A. Garbutt, and that the president be and he is hereby authorized to execute the same provided that it be amended to include the following:
>
> 1. That the titles to the property of the Mutual Gold Corporation be transferred to the buyer to be held [89] in escrow until the sum of $100,000.00 shall be paid into the new cor-

poration to be organized to take titles to the said property;

2. That the seller shall, at all times through its stock interest, have a full minority representation on the board of directors of the corporation to be formed;

3. That adequate provision be made by articles, by-laws and otherwise of the new corporation that said new corporation cannot sell its mining properties and equipment without a two-third vote of the stockholders of the company, and that the directors shall not have the authority to make or dispose of said property without the prior approval of two- thirds of the outstanding capital stock of the new corporation;

4. That in the event of the withdrawal by the buyer after it shall have advanced said $100,000.00 or more, the seller shall have the right to elect a majority of the board of directors and such board shall have the right to immediately elect new officers of the new corporation;

and that suitable provision be made for payment of the open account creditors of the said Mutual Gold Corporation, and further that, in the event that said contract is executed the same be ratified by the stockholders of the company.

(e) Plaintiffs further allege upon information and belief that the said Garbutt caused to be paid the traveling expenses of the said Ferbert and Collins from Spokane to Los Angeles and return therefrom to Seattle, incurred by them during the week following August 6th, 1938. Concurrently therewith, the said Frank A. Garbutt, at times and under particular circumstances known to him and the said directors of Mutual Gold Corporation, did arrange to advance, and later did advance and pay the personal expenses of two of said directors, to-wit: Russell F. Collins and W. L. Grill, and did employ one of said directors, to-wit: Russell F. Collins, on a date unknown to plaintiffs, for services commencing about September 17th, 1938, and continuously thereafter, to work for him in the negotiation for, and execution of the several contracts and conveyances complained of herein, and in the operation of said mining property, and for said ser- [90] vices paid the said Russell F. Collins money, in amounts known to him and to the said Russell F. Collins, but not known to plaintiffs. Also, the said Garbutt paid the traveling expenses of the said Collins for trips to and from Los Angeles and elsewhere in connection with the several negotiations and acts for the procurement and execution of the several contracts, conveyances and deeds under attack in the complaint, and charged the expense of all thereof to Mutual Gold Corporation. That the ledger account of the said Frank A. Garbutt contained items charged to Mutual Gold Corporation

for payments and advances made which included the following:

September 27, 1938	Russell F. Collins Traveling Exp.	$ 50.00
September 20, 1938	Miscellaneous Expense	150.00
October 6, 1938	Russell F. Collins services	19.25
October 12, 1938	Russell F. Collins Traveling Exp.	20.00
October 19, 1938	Russell F. Collins — period ending 10/15	50.00
November 5, 1938	Russell F. Collins, Traveling Exp.	129.55
November 17, 1938	Russell F. Collins, Board, Room & Mileage	92.89
November 21, 1938	Russell F. Collins, acct. hauling contract	35.00
November 25, 1938	Russell F. Collins, hauling machinery and pipe, on acct.	20.00
November 25, 1938	Russell F. Collins, hauling machinery balance	25.31
January 19, 1939	Russell Collins on account	50.00
February 28, 1939	Russell F. Collins Wages	20.00

That said item of September 20, 1930, $150., is listed as miscellaneous expense, whereas in truth and in fact it was paid to W. L. Grill as traveling expenses, and was so admitted, in the presence of Frank A. Garbutt, by Mr. Carter his accountant, at the time of, and in, the deposition of Frank A. Garbutt given on or about August 25th, 1939. That all of said advances were made without any authority by Mutual Gold Corporation or its board of directors, upon the initiation of Frank A. Garbutt, who

thereupon assumed to charge the same upon his ledger account against Mutual Gold. [91]

All of the foregoing were, and are, circumstances and particulars accompanying, and part of, the several frauds which are the basis of complaint in this action, and are in addition to the facts, circumstances and particular conveyances, deeds, bills of sale and contracts executed by and between the said Mutual Gold Corporation, Frank A. Garbutt, Log Cabin Mines Company and the several directors of each of said companies, in consummation of said frauds. All of said circumstances and particulars, which accompanied, constituted and were a part of said frauds as alleged in the complaint, are within the knowledge of the defendants.

Second:

In response to the fourth demand, to-wit: a more definite statement of what plaintiffs mean by their averment on page 4, lines 10 and 11, that they "developed ore bodies in excess of one hundred twenty-five thousand (125,000) tons", plaintiffs allege that said averment means that mineralized rock of commercial value to the amount of one hundred twenty-five thousand (125,000) tons had been demonstrated to exist in the place subject to be stoped, excavated and removed from the mine.

Third:

In response to the fifth demand plaintiffs allege that the names of the persons to whom the alleged

indebtedness mentioned in Paragraph VIII of the complaint was owing, are as follows:

On open accounts about $1,284.93, to-wit:

Associated Oil Co.	$ 8.00
Robert J. Cole	175.00
E. Fuson	237.60
John W. Graham & Co.	1.59
	[92]
Thomas R. L. Harris	25.00
Hess Garage	159.77
L. W. Hutton Estate	30.00
Kent & Rusch	116.14
Leevining Market	153.96
Marshall Letter Co.	19.81
Pacific Telephone & Telegraph Co.	2.25
Hazel Riley	3.50
Shaw Borden Co.	1.74
State of California Unemployment	53.30
State of Washington Unemployment	4.86
Success Printing Co.	33.15
Tiogo Stores	20.83
U. S. Government—Unemployment	61.88
U. S. Government—Old Age	32.81
Western Union Telegraph Co.	3.74
H. P. Woodworth	140.00
	$1,284.93

On Payroll, $550.44, to-wit:

R. F. Collins	$ 367.50
J. R. Sturgeon	182.94
	$ 550.44

To Stockholders on open accounts about $22,785.04, together with accrued interest thereon at 6%, the exact amount of which these plaintiffs are unable to definitely state at this time, to-wit:

G. H. Ferbert	$ 436.90
W. L. Grill	77.00
L. E. Keller	176.50
J. E. Stiegler	3,000.00
F. T. Hickcox	100.00
F. O. Straight	100.00
J. A. Vance	18,592.30
J. A. Vance	302.34
	$22,785.04

That there was also owing, on production notes, $1,807. with accrued interest thereon in the approximate amount of $445.40. Said production notes were then owned and held, as plaintiffs are advised, believe, and therefore allege, by the respective parties in the respective amounts as follows:

Number	Name	Amount
3	H. Robinson	$ 50.00
4	J. B. Rhodes	25.00
5	George F. Shiley	50.00
6	F. M. Haight	3.00
7	Louie Lauer	15.00
9	F. Fletcher	23.50
		[93]
11	F. S. Compton	5.00
15	E. F. Mealey	20.00
16	M. A. Gore	5.00
20	N. F. Kuhn	25.00
24	M. Madsen	100.00
25	F. M. Fry	5.00
26	Helen M. Lorenz	25.00

Number	Name	Amount
28	Chas. P. Jaeger	60.00
29	W. N. Appleman	5.00
32	S. J. Nerdrum	25.00
35	Earl Mayfield	60.00
37	M. Freshwater	40.00
38	Erich Richter	50.00
39	Helen Haefer	5.00
44	Evelyn Horning	10.00
45	Besse Thomas	5.00
46	E. A. Thomas	19.00
51	Aylward Machinery Co.	150.00
53	Gus Hess	140.00
54	A. B. Fitschen	10.00
55	Dr. P. Remington	50.00
58	Chris Mattley	15.00
59	R. T. Nelson	25.00
62	M. Verwey	50.00
65	W. R. Steinbergen	35.00
68	Dr. G. R. Ridgeway	5.00
69	Robert Jacobson	20.00
72	Jack Steenbergen	25.00
74	John Peterson	115.00
75	Melvin Noland	32.50
76	S. J. Nodrum	20.00
79	Albert Henderson	50.00
80	Evelyn Harrug	15.00
81	Louie Lauer	35.00
89	Dr. E. T. Richter	50.00
92	H. E. Burton	25.00
94	H. D. Showalter	100.00
97	O. H. Beyers	64.00
98	Dr. Chas. E. Butts	25.00
99	W. B. Clifton	45.00
100	T. Jrijita	15.00
102	Minnie Rose	10.00
104	G. A. Lukens	25.00
107	Awylward Machinery Co.	25.00
		$1,807.00

There was also owing on production certificates $30,000. not due, payable out of net production receipts accruing from the sale of ores from its mining property, or out of the profits of a voluntary or involuntary sale thereof, as set out in the production certificates, a form copy of which is hereto attached, Marked Exhibit "B", and made a part hereof, which production [94] certificates were then owned and held, as plaintiffs are advised, believe, and allege, by the following parties in the following respective amounts:

Number	Name	Amount
1	Ross Doty	$ 30.00
2	Nettie Fairfield	6.00
3	Al Page	501.00
4	Mr. & Mrs. E. J. Griffin	3.00
5	F. H. Hess	150.00
6	Robt. Jacobson	5.00
7	N. F. Kuhn	25.00
8	Jim Moore	45.00
9	Hidekichi Nishifue	75.00
10	Erich Richter	30.00
11	Jack W. Robillard	3.00
12	C. A. Sparks	15.00
13	J. T. Steenbergen	20.00
14	Sue Steenbergen	20.00
15	Frank B. Totusek	12.00
16	Jerome Totusek	12.00
17	Mary E. Wall	3.00
18	W. G. Peebles	1,000.00
19	N. D. Showalter	90.00
20	Melvin Noland	12.00
21	P. E. Barthen	60.00
22	F. M. Campbell	200.00
23	Gus Hess	100.00
24	John Peterson	75.00
25	Louie Lauer	27.00

Number	Name	Amount
26	Albert Berry	60.00
27	Wilfred Berry	60.00
28	Jerome Totusek	48.00
29	Robert Jacobson	5.00
30	M. R. Stone	99.00
31	Cassie Eberle	45.00
32	Thos. Cowan	30.00
33	Ava B. Colby	24.00
34	Israel Martin	9.00
35	N. N. Richardson	45.00
36	Tillie M. Martin	9.00
37	P. J. Lynch	300.00
38	Chas. Blank	1,002.00
39	F. H. Hess	375.00
40	F. Z. Hurd	300.00
41	John S. Bates	475.05
42	Gilbert Page	112.50
43	E. F. Akers	500.00
44	Robert A. Black	150.00
45	F. H. Foster	125.03
46	Louise Woodward	1,000.00
47	Thos. A. Malone	20.00
48	Gasper Geo. Rececconi	102.00
49	G. H. Ferbert	4,000.00
50	Vance Lumber Co.	6,000.00
51	Frank B. Totusek	100.00
		[95]
52	Fred P. Freeman	100.00
53	Fred P. Freeman	100.00
54	Fred P. Freeman	100.00
55	J. A. Woodin	75.00
56	H. K. Mardong	750.00
57	C. D. Smeltzer	51.00
58	H. D. Keenan	100.00
59	J. E. Stiegler	3,209.42
60	J. A. Vance	8,000.00
		$30,000.00

That the further indebtedness of said Mutual Gold Corporation, owing at said time, plaintiffs are unable to more definitely state at this time.

Fourth:

In response to the sixth demand, plaintiffs allege that on August 25, 1938 Frank A. Garbutt, without valid cause or justification, gave to Mutual Gold Corporation written notice of forfeiture of the purchase contract, a copy of said notice being hereto attached, marked Exhibit "C", and made a part hereof. Said forfeiture was wrongful, fraudulent and unlawful in that same was without present or contemplated consideration and part of a scheme whereby illegally to deprive Mutual Gold Corporation of its assets as alleged in the complaint and in this bill of particulars.

Fifth:

In response to the seventh demand, plaintiffs allege that the arrangement for compensation, referred to in lines 22 and 23 of page 6 of the complaint, was paid pursuant to an arrangement with Russell F. Collins, G. H. Ferbert and W. L. Grill. [96]

Sixth:

In response to the eighth demand, plaintiffs allege that the defendant Frank A. Garbutt:

(a) Procured the services of Russell F. Collins, G. H. Ferbert and W. L. Grill to actively assist in doing all and several the acts complained of in the

complaint, and specified in this bill of particulars.

(b) Arranged for, and did pay to Russell F. Collins and W. L. Grill their expenses, and for services, in the several amounts as shown herein.

(c) Gave the notice of forfeiture of August 25th, 1938, a copy of which is attached hereto.

(d) Induced the said Russell F. Collins and G. H. Ferbert to state and represent at a meeting of the stockholders and a meeting of the directors of Mutual Gold Corporation, held August 6th, 1938 or therabouts, that he would make a better deal than Vance, and in the interests of Mutual Gold Corporation. By their aid he obtained the several conveyances herein complained of, and made the several contracts specified in the complaint.

(e) Organized, and caused the organization of Log Cabin Mines Company to relieve himself of personal responsibility in the premises, said Log Cabin Mines Company being without assets except such as he owned and controlled.

(f) On or about September 11th, 1938, took wrongful possession of said mine and of all of the assets of Mutual Gold Corporation, and ever since has been in possession and control of same, and at all times since September 2, 1938, held himself out to Mutual Gold Corporation and its stockholders as its representative, operating the property for it.

[97]

All of the particular acts by the said Frank A. Garbutt were done under such circumstances that the true status of the property was unknown to

plaintiffs or other objecting stockholders of Mutual Gold Corporation, and was not disclosed or divulged by defendants, and said status and the accounts of said transactions were not enerted upon, and did not appear upon the books of account, or records of Mutual Gold Corporation; that the books of account of Log Cabin Mines Company have never been made accessible to plaintiffs or said dissenting stockholders. That at all times there was a non-disclosure by defendants of the true facts of said transactions, and a holding out to Mutual Gold Corporation and its stockholders that said mine was the property of Mutual Gold Corporation and operated by Garbutt for it.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
Attorneys for Plaintiffs. [98]

State of Idaho
County of Kootenai—ss.

M. I. Higgens, being first duly sworn, on oath deposes and says: that he is one of the plaintiffs herein, and that he makes this verification on his own behalf and on behalf of his co-plaintiffs; that he is familiar with the contents of the foregoing bill of particulars and that the matters and things therein contained are true in substance and in fact.

M. I. HIGGENS.

Subscribed and Sworn To before me this 19 day of March, 1940.

(Seal) J. WARD ARNEY,

Notary Public in and for the State of Idaho, residing at Coeur d'Alene.

My commission expires 11-1-43. [99]

EXHIBIT "A"

Memorandum of Agreement between Mutual Gold Corporation, organized under the laws of the State of Washington, hereinafter called the Seller, and Cecil B. deMille, hereinafter called the Buyer, Witnesseth:

The Seller, through its duly authorized representatives, states to the Buyer that it holds and is the owner in good standing of the contract hereinafter described for the lease and purchase of the Log Cabin Mine and that it has complied with all of the agreements to be performed to date thereunder; That it requires further equipment to make said property properly profitable:

1.	Bringing in electric power from Leevining or Tioga Lodge, 2½ miles	$11,000.00
2.	Electric hoist complete with motor and starter, etc.	7,000.00
3.	Cage or skip and mine cars	1,500.00
4.	Ball mill, 100 tons capacity, including motor, etc.	7,000.00

5.	Classifier complete	3,000.00
6.	Cyanide equipment, including tanks, motor and equipment capable of handling 100 tons daily	25,000.00
7.	6-inch pipe line, 5000 feet and installation thereof, to carry tailings to impounding dam	3,000.00
8.	500 cubic foot compressor, with motor, etc.	4,000.00
9.	Additional building to house new machinery, including coverage for cyanide tanks	3,000.00
10.	New bunkhouse and addition to cookhouse	1,500.00
11.	Assay office and equipment	1,000.00
12.	Enlargement of present ore bins at shaft and mill	1,000.00
13.	Payroll, truck hauling, cement, sand, etc. for 60 days during installation of above	10,000.00
14.	Payment due on property Nov. 1, 1938	10,000.00
	Total	$88,000.00

The Seller operated said property for about 8 months and [100] treated the ore by amalgamation only, in the present 35 ton mill owned by it on the property with a daily recovery of $297.50 and a daily expense of $205.00.

The Seller milled some 6300 tons of ore, being all of the ore obtained from its development work on said property and realized $53,350.00 therefrom at a profit of about $14,000; detailed costs having been furnished to the Buyer.

The Seller and Buyer agree to cooperate in investigating and determining whether more suitable milling equipment than that above described and

recommended by the Seller can be obtained and if, in the opinion of the Buyer, such proves to be the case he may, at his option, alter the specification of the milling equipment accordingly provided said alteration meets with the approval of M. J. Keily.

The Seller agrees to sell its contract dated July 13, 1932 with the Chandis Securities Company, M. N. Ryan and Alice Clark Ryan for the purchase of the Log Cabin Mine and the group of mining claims contiguous thereto, subject to all modifications of said contract, which contract and its modifications are hereby made a part hereof; Included in this sale are all personal and real property belonging to the Seller now on or adjacent or tributary to, or used in connection with said Log Cabin Mine and its group.

And as to the fulfillment of this agreement upon the part of The Buyer will require some time, the Seller agrees to forthwith transfer its title to said property, real and personal, to Frank A. Garbutt, as trustee, to insure the carrying out of this agreement but without liability upon the trustee except the liability to transfer the said property to the Buyer, or his nominee, if and when said Buyer has well and fully performed his agreements con- [101] tained herein and/or re-convey said title to the Seller in event said Buyer does not faithfully carry out his agreements herein contained.

The Trustee shall not be liable for any acts or omissions of either party hereto nor for any defects in the title to said property either existing or

future, no matter how caused, and shall not be required to perform any act for the protection of said title unless or until instructed in writing by the beneficiaries hereunder and furnished with funds to do so. It is also agreed and understood that said trustee may acquire, if he so desires, any interest with either the Seller or Buyer without affecting his status as trustee.

In consideration of this agreement and the transfer above set forth, the Buyer agrees to do the following things:

1. Furnish $10,000 to make the payment due the owners of the Log Cabin Mine November 1st, 1938.

2. Organize a corporation of such Capital Stock as he may desire and forthwith transfer one-half of its total authorized Capital Stock less one controlling share, to the Seller.

3. Furnish additional funds to a minimum of $100,000. including the above mentioned $10,000 to said corporation to be formed, as needed by it to equip said Log Cabin Mine with a mill of an estimated capacity of one hundred (100) tons daily or more, a suitable hoist and to bring in electrical power and for such other equipment and supplies as appear advisable.

4. Cause said trustee to transfer to said Corporation all titles received hereunder forthwith after said Corporation is qualified to hold same.

5. Take care of all further payments falling due to the owners of said Log Cabin Group amounting to $120,000.00 in all. [102]

6. Proceed with the work of properly equipping said property as rapidly as weather conditions will permit.

7. Employ M. J. Keily, if he is available and as long as Frank A. Garbutt deems it advisable, to direct and superintend said mining operations.

8. At the Buyer's option to advance additional funds should such advances, in the opinion of the Buyer, become necessary or advisable.

9. Furnish the Seller with proper and detailed monthly statements of the operations of the Corporation to be formed.

10. The Buyer agrees to cooperate with the Seller in any reasonable way in protecting its and its stockholders' interests in order that the smallest shall receive benefits proportionate to the largest.

The Buyer shall be entitled to be repaid for all advances made by him out of any profits or funds available from the operation of said property or sale or other disposition of the property, but not otherwise.

When the Buyer has performed all acts hereinabove set forth which are obligatory hereunder he shall be deemed to have fulfilled this contract and his liability shall cease.

The Buyer may also terminate his liability hereunder at any time after furnishing the first $10,000 specified herein by surrendering this contract and re-transferring said property to the Seller, in which event the Buyer shall be entitled to a repayment of the money advanced by him but only out of net

profits, or out of funds derived from the sale of said property shall the Seller herein sell to third parties. This right to repayment shall exist only for such advances as are made in accordance with this contract and the Buyer herein shall not be entitled to re- [103] payment for any further or additional advances, unless he has secured the written approval thereto of the Seller.

The Buyer, or his representatives, will consult at all reasonable times with the Seller before making any unusual or extraordinary outlays not contemplated herein and further agrees, insofar as his control of the enterprise is concerned, to use his best judgment in carrying on the operations contemplated. [104]

EXHIBIT "B"

PRODUCTION CERTIFICATE

No. ..... $.....

For Value Received, the undersigned, a Washington Corporation, agrees to pay to..... the sum of ..... Dollars, without interest, out of net production receipts accruing from the sale of ores from its mining property, before any dividends shall be declared or paid by it upon its capital stock, and in no other manner whatsoever, except that in case of a voluntary or involuntary sale of its mining property, any balance unpaid hereon shall be paid out of the proceeds thereof

before any distribution shall be made to its stockholders.

"Net Production Receipts" hereinbefore referred to shall be construed to mean such receipts as shall remain after deducting therefrom all of the costs of producing, handling and milling said ore, necessary corporation expenses and taxes, a reasonable sum for mine development, such sum as the Board of Directors shall determine may be necessary for the purchase and/or payment of necessary mining equipment, and payments on account of the purchase price of said mining property by royalty or otherwise.

All sums which the undersigned shall have for the retirement of this and similar certificates shall be applied pro-rata upon the same.

The execution of this certificate has been authorized by resolution of the Board of Directors.

Dated this ..... day of January, 1938.

MUTUAL GOLD CORPORATION

By .....

Vice President.

Attest:

.....

Secretary. [105]

EXHIBIT "C"

Mutual Gold Corporation
401 Fernwell Building
Spokane, Wash.

August 25, 1938

Gentlemen:

This will inform you that we have elected to cancel and we hereby cancel your option and contract to purchase the Log Cabin Mine, which option and which contract is dated July 13, 1932. This action is final and absolute.

We recognize that this cancellation, while legal, may work a great hardship upon your stockholders but should you wish to negotiate for rehabilitation of this contract you may negotiate with the undersigned who will give the matter consideration provided your defaults are cured and other points of difference are adjusted to his satisfaction.

(Signed) FRANK A. GARBUTT.

Frank A. Garbutt—duly authorized representative of the owners, Chandis Securities Company and Alice Clark Ryan.

cc to
Mutual Gold Corporation
Box 377, Leevining, Cal.

cc to
Mutual Gold Corporation
Attention: Mr. J. A. Vance, General Manager,
Vance Hotel,
Seattle, Washington

[Endorsed] Bill of Particulars. Filed Mar. 28, 1940. [106]

[Title of District Court and Cause.]

ANSWER OF FRANK A. GARBUTT, ALICE CLARK RYAN, AND LOG CABIN MINES COMPANY.

Defendants Frank A. Garbutt, Alice Clark Ryan, and Log Cabin Mines Company, a corporation, for answer to plaintiffs' complaint herein, admit, deny, and alleges as follows:

I.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

II.

Answering paragraph IV of the complaint, defendants deny that plaintiff Charles W. Sutherland was at the time this suit was brought, or is now, a stockholder of defendant Mutual Gold Corporation, but admit that a majority of the stockholders and directors of said Mutual Gold Corporation were opposed to the bringing of this action. Further answering, defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of plaintiffs' other allegations contained in said paragraph.

III.

Answering paragraph V of the complaint, defendants deny that Frank A. Garbutt has represented the owners in any respect since October 3, 1938.

[107]

IV.

Answering paragraph VI of plaintiffs' complaint, defendants admit that a stamp mill was erected on one of said claims; they deny that ore bodies in excess of 63,500 tons were developed in or on said claims; they deny that such ore bodies as were developed contained recoverable gold values in excess of $650,000.00; and they allege that they are without knowledge or information sufficient to form a belief as to the truth of the other allegations of said paragraph.

Further answering, defendants allege that said stamp mill was erected by one J. A. Vance while he was acting as manager of defendant Mutual Gold Corporation's properties; that said J. A. Vance is the real party plaintiff in interest herein who induced and procured the nominal plaintiffs to bring this action; that said mill was unfit for milling ore at said property; that the money expended therefor was wasted and lost to defendant Mutual Gold Corporation through the negligence, incompetence, and betrayal of trust of said J. A. Vance; and that said developed ore contained no gold whatever that could have been recovered at a profit by the mill erected by, and the methods used by, said J. A. Vance as such manager.

V.

Answering paragraph VII of said complaint, defendants, deny that all the assets mentioned therein had a value on September 2, 1938 or at any other time in excess of $60,000.00; deny that the stamp

mill, milling and mining machinery, supplies, and equipment mentioned therein were of the reasonable value of more than $3,000.00; and deny that the additional mining claims mentioned therein were of the reasonable value of more than $5,000.00.

VI.

Answering paragraph VIII of said complaint, defendants [108] allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein.

VII.

Answering paragraph IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, and XIX of said complaint, defendants deny that Frank A. Garbutt at any time conspired at all with or prevailed upon or caused the board of directors and/or executive officers of defendant Mutual Gold Corporation or any other person or corporation to transfer or agree to transfer the Mutual Gold Corporation's assets, or any assets, to a new corporation or at all, or to do anything whatsoever. Further answering, defendants allege that all the acts of Frank A. Garbutt complained of were taken and performed by him in good faith at the request of the Mutual Gold Corporation and without any secret or hidden purpose or intent in the belief that they were legal and fair and equitable to all parties concerned; and defendants allege that any and all transfers and acts of defendant Mutual Gold Corporation were made

and performed by it through its said executive officers and directors of their own *violation* without any duress, menace, fraud, or undue or improper influence whatsoever on the part of Frank A. Garbutt or any other person, and were made and performed by it without any intent to circumvent or violate any laws of the State of Washington or any laws, or to injure said Mutual Gold Corporation or its stockholders or creditors; and defendants further allege that all such transfers and acts were made and performed by said Mutual Gold Corporation, through its said executive officers and directors, with the authorization and approval of its stockholders, for an adequate and fair consideration, in a manner which defendants believe to have been in accord with the laws and public policy applicable thereto, because defendant Mutual Gold Corporation had no funds with [109] which to carry on its business and because said executive officers and directors therefore believed such transfers and acts to be for the best interest of said corporation and its stockholders and creditors, and to be necessary to prevent the total loss of said assets.

Further answering, defendants deny that said new corporation was to have no capital or assets other than the assets of the Mutual Gold Corporation, and allege that it was to have and did have $10,000.00 cash paid into it for its capital stock.

Further answering, defendants allege that provision was made by defendants Mutual Gold Corpora-

tion, Frank A. Garbutt, and Log Cabin Mines Company for payment of the creditors of Mutual Gold Corporation.

Further answering, defendants deny that Frank A. Garbutt wrongfully gave any notice of forfeiture or arranged to advance or did advance the personal expenses of two or any number of said directors, or agreed to employ or did employ any of said directors to work for him in the negotiation for or the execution of any contracts or conveyances whatever; but defendants admit that Frank A. Garbutt loaned money from time to time to defendant Mutual Gold Corporation at its special instance and request which said corporation used for the payment of such expenses as it deemed fit and proper.

Further answering, defendants deny that any of defendant Log Cabin Mines Company's stock has been pledged to Frank A. Garbutt as alleged in paragraph XVII of the complaint, or to any one else.

VIII.

Defendants deny each and every allegation contained in paragraph XX and paragraph XXI of said complaint. [110]

IX.

Answering the allegation in paragraph XXII of said complaint that an installment of ten thousand dollars ($10,000.) due November 1, 1939 on the purchase contract has not been paid, defendants allege that $5,000.00 of said installment has been

paid and that as to the other $5,000.00 such extension of time for payment has been obtained as may be necessary for the obligors to as late as, but not beyond, November 1, 1940. Defendants deny each and every other allegation contained in said paragraph.

X.

Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXIII, XXV, and XXVII of said complaint.

For a Further, Separate, and Second Defense, Defendants Allege:

That plaintiff Helen Maude Lorenz is estopped to bring this action for the reason that, as defendants are informed and believe and on that ground allege, she gave her proxy to J. E. Stiegler, president of defendant Mutual Gold Corporation, to be voted by him at the meeting of the stockholders of said corporation held on August 6, 1938; and that he voted said proxy, pursuant to authority that said plaintiff had given him, in favor of a resolution adopted at said meeting authorizing the directors of said corporation to do anything they deemed advisable in dealing with or disposing of said corporation's property.

For a Further, Separate, and Third Defense, Defendants Allege:

That the title to said contract of July 13, 1932 and to the supplements and modifications thereof has

been ad- [111] judged in Case No. 440-367 in the Superior Court of the State of California in and for the County of Los Angeles, entitled "Log Cabin Mines Company, a corporation, plaintiff, vs. Mutual Gold Corporation, a corporation, defendant," to be vested in defendant Log Cabin Mines Company; and that said judgment has become final and the matter is now res judicata. A copy of said judgment is attached hereto, marked "Exhibit A", and is hereby made a part of this answer.

For a Further, Separate, and Fourth Defense, Defendants Allege:

That on August 6, 1938, at a meeting of the stockholders of defendant Mutual Gold Corporation regularly called and held, a resolution was adopted by the affirmative vote of more than two-thirds of all said stockholders authorizing the doing of all the acts of said defendant corporation that plaintiffs complain of. A copy of said resolution is attached hereto as "Exhibit B", and is hereby made a part of this answer.

For a Further, Separate, and Fifth Defense, Defendants Allege:

I.

That plaintiffs are not the real parties in interest in this action; that the real party in interest is one J. A. Vance of the State of Washington; that this suit was brought at his instigation; that he solicited each of the nominal plaintiffs to join in this suit and

agreed to pay all their expenses incurred herein, including attorneys' fees; that this suit is one of four that he has caused to be brought to further his plan to obtain control of said defendant Mutual Gold Corporation and its property; and that this suit was not brought in good faith to and for the benefit of the minority stockholders of said Mutual Gold Corporation other than the said J. A. Vance. [112]

II.

That said J. A. Vance is estopped to bring this action for the reason that he voted in favor of the resolution of which Exhibit B attached hereto is a copy.

Wherefore, defendants pray that plaintiffs take nothing by their action, and that defendants have judgment for their costs herein.

DAVID E. HINCKLE,
Attorney for Defendants.

[113]

EXHIBIT A

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 440-367

LOG CABIN MINES COMPANY, a corporation,
Plaintiff,

vs.

MUTUAL GOLD CORPORATION, a corporation, et al,
Defendants.

JUDGMENT QUIETING TITLE AFTER DEFAULT TO PERSONAL PROPERTY.

In this action, it appearing to the satisfaction of this Court, sitting in Department 34 thereof, that

(a) The defendant Mutual Gold Corporation, a corporation, was duly and personally served with the Summons and Complaint herein, and

(b) It further appearing that no appearance has been made and no answer filed by the said defendant; and a default of said defendant having been duly entered; and evidence having been introduced and heard in open court, and the court being satisfied that the allegations of the complaint are true, and that the relief asked for should be granted,

Now, upon motion of David E. Hinckle, Attorney for the plaintiff Log Cabin Mines Company,

It is hereby Ordered, Adjudged, and Decreed:

1. That at the time of the commencement of this action there was vested in plaintiff, as the owner

absolute, title to that certain contract dated July 13, 1932 for the sale of certain mining claims in Mono County, California, executed by M. N. Clark, Alice Clark Ryan, and the Chandis Securities Company as vendors, and by Russell F. Collins and Ben L. Collins as vendees, as said contract was supplemented by written instrument dated April 28, 1934 and was modified and amended by written instrument executed on or about October 9, 1936, a [114] copy of said contract being attached, as "Exhibit A", to the complaint filed herein, and a copy of said instrument supplementing said contract being attached, as "Exhibit B", to said complaint, and a copy of said instrument modifying and amending said contract being attached, as "Exhibit C", to said complaint.

Said mining claims agreed by said contract to be conveyed are: Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Mill Site, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tammarack, Oro, and Burke Fraction.

II. Plaintiff's title to the above described personal property is hereby forever quieted against any and all claims, demands, and/or pretensions of said defendant to any right, title, possession, lien, interest, and/or equity in the above described personal property, and it is hereby perpetually enjoined and restrained from setting up or making any

claim to or upon the personal property above described, or any part thereof.

Dated: June 13th, 1939.

WILSON,

Judge of the Superior Court.

[115]

EXHIBIT B

RESOLUTION ADOPTED BY THE STOCKHOLDERS OF MUTUAL GOLD CORPORATION ON AUGUST 6, 1938.

"Resolved, that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, deal with, operate, exchange or otherwise dispose of, to any person, persons, or corporation desiring to purchase, lease, deal with, exchange, operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection, which in their judgment they may deem necessary or advisable."

[116]

State of California
County of Los Angeles—ss.

Frank A. Garbutt being by me first duly sworn, deposes and says: that he is one of the defendants

answering herein to the complaint in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

FRANK A. GARBUTT.

Subscribed and sworn to before me this 11th day of April, 1940.

(Seal) ALTHEA K. HINCKLE,

Notary Public within and for Los Angeles County, California.

My commission expires May 20, 1940.

[Endorsed]: Filed Apr. 11, 1940. [117]

[Title of District Court and Cause.]

ANSWER OF
MUTUAL GOLD CORPORATION.

Defendant Mutual Gold Corporation, a corporation, for answer to plaintiffs' complaint herein, admits, denies, and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of the complaint.

II.

Answering paragraph IV of the complaint, defendant denies that plaintiff Charles W. Sutherland was at the time this suit was brought, or is now, a stockholder of defendant Mutual Gold Corporation, but admits that a majority of the stockholders and directors of said corporation were opposed to the bringing of this action. Further answering, defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of plaintiffs' other allegations contained in said paragraph.

III.

Answering paragraph V of the complaint, defendant denies that Frank A. Garbutt has represented the owners in any respect or matter since October 3, 1938. [118]

IV.

Answering paragraph VI of plaintiffs' complaint, defendant admits that a stamp mill was erected on one of said claims; but it denies that ore bodies in excess of 63,500 tons were developed in or on said claims; denies that such ore bodies as were developed contained recoverable gold values in excess of $650,000.00; and denies each and every other allegation contained in said paragraph.

Further answering, defendants allege that said stamp mill was erected by one J. A. Vance while he was acting as manager of defendant Mutual Gold

Corporation's properties; that said J. A. Vance is the real party plaintiff in interest herein who induced and procured the nominal plaintiffs to bring this action; that said mill was unfit for milling ore at said claims; that the money expended therefor was wasted and lost to defendant Mutual Gold Corporation through the negligence, incompetence, and betrayal of trust of said J. A. Vance; and that said developed ore contained no gold whatever that could have been recovered at a profit by the mill erected by, and the methods used by, said J. A. Vance as such manager.

V.

Answering paragraph VII of said complaint, defendant denies that all the assets mentioned therein had a value on September 2, 1938 or at any other time in excess of $60,000.00; denies that the stamp mill, milling and mining machinery, supplies, and equipment mentioned therein were of the reasonable value of more than $5,000.00; and denies that the additional mining claims mentioned therein were of the reasonable value of more than $5,000.00.

VI.

Answering paragraphs IX, X, XI, XII, XIII, XIV, XV, XVI XVII, XVIII, and XIX of said complaint, defendant [119] denies that Frank A. Garbutt at any time conspired at all with or prevailed upon or caused the board of directors and/or executive officers of defendant Mutual Gold Cor-

poration or any other person or corporation to transfer or agree to transfer the Mutual Gold Corporation's assets, or any assets, to a new corporation or at all, or to do anything whatsoever. Further answering, defendant alleges that all the acts of Frank A. Garbutt complained of were taken and performed by him in good faith at the request of the Mutual Gold Corporation and without any secret or hidden purpose or intent in the belief that they were legal and fair and equitable to all parties concerned; and defendant alleges that any and all transfers and acts of defendant Mutual Gold Corporation were made and performed by it through its said executive officers and directors of their own volition without any duress, menace, fraud, or undue or improper influence whatsoever on the part of Frank A. Garbutt or any other person, and were made and performed by it without any intent to circumvent or violate any laws of the State of Washington or any laws, or to injure said Mutual Gold Corporation or its stockholders or creditors; and defendant further alleges that all such transfers and acts were made and performed by it, through its said executive officers and directors, with the authorization and approval of its stockholders, for an adequate and fair consideration, in a manner which defendant believes to have been in accord with the laws and public policy applicable thereto, because defendant had no funds with which to carry on its business and because said executive officers

and directors therefore believed such transfers and acts to be for the best interest of said corporation and its stockholders and creditors, and to be necessary to prevent the total loss of said assets.

Further answering, defendant denies that said new corporation was to have no capital or assets other than the as- [120] sets of the Mutual Gold Corporation, and alleges that it was to have and did have $10,000.00 cash paid in to it for its capital stock.

Further answering, defendant alleges that provision was made by defendants Mutual Gold Corporation, Frank A. Garbutt, and Log Cabin Mines Company for payment of the creditors of Mutual Gold Corporation.

Further answering, defendant denies that Frank A. Garbutt wrongfully gave any notice of forfeiture or arranged to advance or did advance the personal expenses of two or any number of said directors, or agreed to employ or did employ any of said directors to work for him in the negotiation for or the execution of any contract or conveyance whatever; but defendant admits that Frank A. Garbutt loaned money to it from time to time at its special instance and request, which is used for the payment of such expenses as it deemed fit and proper.

Further answering, defendant denies that any of defendant Log Cabin Mines Company's stock has been pledged to Frank A. Garbutt as alleged in paragraph XVII of the complaint, or to any one else or at all.

VII.

Defendant denies each and every allegation contained in paragraphs XX, XXI, and XXII of said complaint.

VIII.

Answering paragraph XXIII of said complaint, defendant admits that, as alleged, a special meeting of its stockholders was called and the call rescinded, but denies that said rescission was because of opposition of its stockholders to any corporate action performed or proposed to be performed, and denies each and every other allegation in said paragraph contained. [121]

IX.

Answering paragraph XXIV of said complaint, defendant denies that plaintiffs or any other of defendant's stockholders have applied to the president of this defendant corporation to call a stockholders' meeting to consider specially the acts, agreements, and conveyances complained of, or to obtain relief therefrom; and denies that said president has ever refused to call such a stockholders' meeting.

X.

Answering paragraph XXV of said complaint, defendant admits that the number of shares of this corporation's stock represented by plaintiffs is less than one-third of all the outstanding stock of this corporation, but denies each and every other allegation in said paragraph contained.

XI.

Answering paragraph XXVII of said complaint, defendant denies that it has no legal remedy to protect its rights, interest, and title in said property, and denies that its rights, interest, and title therein and thereto are in anywise in jeopardy.

For a Further, Separate, and Second Defense Defendant Alleges:

That plaintiff Helen Maude Lorenz is estopped to bring this action for the reason that, as defendant is informed and believes and on that ground alleges, she gave her proxy to J. E. Stiegler, president of this defendant corporation, to be voted by him at the meeting of the stockholders of this corporation held on August 6, 1938; and that he voted said proxy, pursuant to authority that said plaintiff had given him, in favor of a resolution adopted at said meeting authorizing the directors of this corporation to do anything they deemed ad- [122] visable in dealing with or disposing of this defendant's property.

For a Further, Separate, and Third Defense, Defendant Alleges:

That the title to said contract of July 13, 1932 and to the supplements and modifications thereof has been adjudged in Case No. 440-367 in the Superior Court of the State of California in and for the County of Los Angeles, entitled "Log Cabin Mines Company, a corporation, plaintiff, vs. Mutual Gold Corporation, a corporation, defendant," to

be vested in defendant Log Cabin Mines Company; and that said judgment has become final and the matter is now res judicata. A copy of said judgment is attached hereto, marked "Exhibit A," and is hereby made a part of this answer.

For a Further, Separate, and Fourth Defense, Defendant Alleges:

That on August 6, 1938, at a meeting of the stockholders of this defendant corporation regularly called and held, a resolution was adopted by the affirmative vote of more than two-thirds of all said stockholders authorizing the doing of all the acts of this defendant that plaintiffs complain of. A copy of said resolution is attached hereto as "Exhibit B", and is hereby made a part of this answer.

For a Further, Separate, and Fifth Defense, Defendant Alleges:

That plaintiffs are not the real parties in interest in this action; that the real party in interest in one J. A. Vance of the State of Washington; that this suit was brought at his instigation; that he solicited each of the [123] plaintiffs to join in this suit and agreed to pay all their expenses incurred herein, including attorneys' fees; that this suit is one of four that he has caused to be brought to further his plain to obtain control of this defendant corporation and its property; and that this suit was not brought in good faith to and for the

benefit of the minority stockholders of this corporation.

That said J. A. Vance is estopped to bring this action for the reason that he voted in favor of the resolution of which Exhibit B attached hereto is a copy.

Wherefore, defendant prays that plaintiffs take nothing by their action, and that defendant have judgment for its costs.

DAVID E. HINCKLE,
Attorney for Defendant. [124]

EXHIBIT A

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 440-367

LOG CABIN MINES COMPANY, a corporation,
Plaintiff,

vs.

MUTUAL GOLD CORPORATION, a corporation, et al.,
Defendants.

JUDGMENT QUIETING TITLE AFTER DEFAULT TO PERSONAL PROPERTY.

In this action, it appearing to the satisfaction of this Court, sitting in Department 34 thereof, that

(a) The defendant Mutual Gold Corporation, a corporation, was duly and personally served with the Summons and Complaint herein, and

(b) It further appearing that no appearance has been made and no answer filed by the said defendant; and a default of said defendant having been duly entered; and evidence having been introduced and heard in open court, and the court being satisfied that the allegations of the complaint are true, and that the relief asked for should be granted,

Now, upon motion of David E. Hinckle, Attorney for the plaintiff Log Cabin Mines Company,

It is hereby Ordered, Adjudged, and Decreed;

I. That at the time of the commencement of this action there was vested in plaintiff, as the owner absolute, title to that certain contract dated July 13, 1932 for the sale of certain mining claims in Mono County, California, executed by M. N. Clark, Alice Clark Ryan, and the Chandis Securities Company as vendors, and by Russell F. Collins and Ben L. Collins as vendees, as said contract was supplemented by written instrument dated April 28, 1934 and was modified and amended by written instrument executed on or about October 9, 1936, a copy [125] of said contract being attached, as "Exhibit A," to the complaint filed herein, and a copy of said instrument supplementing said contract being attached, as "Exhibit B", to said complaint, and a copy of said Instrument modifying and amending said contract being attached, as "Exhibit C", to said complaint.

Said mining claims agreed by said contract to be conveyed are: Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Mill Site, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro, and Burke Fraction.

II. Plaintiff's title to the above described personal property is hereby forever quieted against any and all claims, demands, and/or pretensions of said defendant to any right, title, possession, lien, interest and/or equity in the above described personal property, and it is hereby perpetually enjoined and restrained from setting up or making any claim to or upon the personal property above described, or any part thereof.

Dated: June 13th, 1939.

WILSON

Judge of the Superior Court.

[126]

EXHIBIT B

Resolution Adopted by the Stockholders of Mutual Gold Corporation on August 6, 1938.

"Resolved, that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, deal with, operate, exchange or otherwise dispose of, to any person, persons, or corporation desiring to purchase, lease,

deal with, exchange, or operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection, which in their judgment they may deem necessary or advisable." [127]

State of Washington
County of Spokane—ss.

E. Fuson, being by me first duly sworn, deposes and says: that she is the assistant secretary of Mutual Gold Corporation, a Washington corporation, and one of the defendants in the above entitled action; that she has read the foregoing answer and knows the contents thereof; and that the same is true of her own knowledge, except as to the matters which are therein stated upon her information or belief, and as to those matters that she believes it to be true.

E. FUSON

Subscribed and sworn to before me this 8th day of April, 1940.

[Seal] E. D. WELLER

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Apr. 11, 1940. [128]

[Title of District Court and Cause.]

ANSWER OF CHANDIS SECURITIES COMPANY

Comes now the defendant, Chandis Securities Company, and answering plaintiffs' complaint and Bill of Particulars for itself, alone, admits, denies and alleges as follows:

I.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph I of plaintiffs' complaint.

II.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of plaintiffs' complaint.

III.

Denies that Frank A. Garbutt represented this defendant since the negotiation of the purchase contract referred to in paragraph V of plaintiffs' complaint in respect to all matters of performance thereof, or in any such matters whatsoever, and alleges that said Frank A. Garbutt is not now, and at no time has been, the agent or representative of this defendant in respect to matters of performance of said purchase contract.

IV.

Alleges that this defendant is without knowledge or informa- [129] tion sufficient to form a belief as to the truth of the allegations in paragraph VI of plaintiffs' complaint.

V.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VII of plaintiffs' complaint.

VI.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VIII of plaintiff's complaint.

VII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IX of plaintiff's complaint.

VIII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph X of plaintiffs' complaint.

IX.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in paragraph XI of plaintiffs' complaint.

X.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XII of plaintiffs' complaint.

XI.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XIII of plaintiffs' complaint.

XII.

Alleges that this defendant is without knowledge or in- [130] formation sufficient to form a belief as to the truth of the allegations contained in paragraph XIV of plaintiffs' complaint.

XIII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XV of plaintiff's complaint.

XIV.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XVI of plaintiffs' complaint.

XV.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XVII of plaintiffs' complaint.

XVI.

Answering paragraph XVIII of plaintiffs' complaint, denies that the deed, a copy of which is attached to plaintiffs' complaint, marked Exhibit "14" was executed with the knowledge and approval of this defendant, and alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph XVIII contained.

XVII.

Answering paragraph XIX of plaintiffs' complaint, alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said paragraph XIX of plaintiffs' complaint.

XVIII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XX of plaintiffs' complaint. [131]

XIX.

Answering paragraph XXI of plaintiff's complaint, denies that each of the contracts, deeds, bills of sale and assignments referred to in said

paragraph XXI were executed and the acts of Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company referred to in said paragraph XXI were done with the knowledge and approval of this defendant; denies that said contracts, deeds, bills of sale and assignments were executed and said acts of Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company were done as a part of the unlawful conspiracy alleged by plaintiff to transfer all of the assets of Mutual Gold Corporation to Log Cabin Mines Company without consideration, for a minority stock interest in Log Cabin Mines Company, and alleges that all of said contracts, deeds, bills of sale and assignments were executed and the said acts of Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company were done without the knowledge or approval of this defendant. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph XXI contained.

XX.

Answering paragraph XXII of plaintiffs' complaint, admits that the installment of Ten Thousand Dollars ($10,000.00) due on the purchase contract November 1, 1939 had not been paid at the time of filing plaintiffs' complaint. Alleges that subsequent to the time of filing plaintiffs' complaint, and on or about March 29, 1940, the sum of Five Thousand Dollars ($5,000.00) on account of said in-

stallment of Ten Thousand Dollars ($10,000.00) was paid to and received by this defendant. Denies that this defendant has refused to recognize Mutual Gold Corporation as the owner of the purchase contract referred to in said paragraph XXII of plaintiffs' complaint at all times [132] since September 2, 1938, or at any time, or at all. Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the other allegations in said paragraph XXII contained.

XXI.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXIII of plaintiffs' complaint.

XXII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXIV of plaintiffs' complaint.

XXIII.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXV of plaintiffs' complaint.

XXIV.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the

truth of the allegations contained in paragraph XXVI of plaintiffs' complaint.

XXV.

Alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph XXVII of plaintiffs' complaint.

XXVI.

Answering paragraph First of plaintiffs' Bill of Particulars furnished the defendants pursuant to order of court dated February 17, 1940, supplementing plaintiffs' complaint, denies that the circumstances and particulars referred to in said paragraph First are within the knowledge of this defendant and alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations [133] in said paragraph First contained.

XXVII.

Answering paragraph Third of plaintiffs' Bill of Particulars furnished the defendants pursuant to order of court dated February 17, 1940, supplementing plaintiffs' complaint, alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Third of plaintiffs' Bill of Particulars.

XVIII.

Answering paragraph Fourth of plaintiffs' Bill of Particulars furnished the defendants pursuant to

order of court dated February 17, 1940, supplementing plaintiffs' complaint, alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph Fourth of plaintiffs' Bill of Particulars.

XXIX.

Answering allegations contained in paragraphs Fifth and Sixth of plaintiffs' bill of particulars, furnished the defendants pursuant to order of court dated February 17, 1940, supplementing plaintiffs' complaint, admits that the true status of the property referred to on page 12 of said Bill of Particulars was not disclosed or divulged by this defendant, and alleges that this defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraphs Fifth and Sixth contained.

Wherefore, the defendant, Chandis Securities Company prays that plaintiffs take nothing by their action, and that this defendant have judgment for its costs herein.

RICHARD G. ADAMS
Attorney for Defendant,
Chandis Securities Company.
Times Building,
202 West First Street,
Los Angeles, California
MAdison 2345 [134]

State of California
County of Los Angeles—ss.

H. E. Downing, being first duly sworn, deposes and says: That he is an officer, to-wit, Assistant-Secretary of Chandis Securities Company, one of the defendants in the foregoing and above entitled action; that he has read the within Answer and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are herein stated on his information or belief, and as to those matters he believes it to be true.

H. E. DOWNING

Subscribed and sworn to before me this 18th day of April, 1940.

[Seal] C. O. DENNING
Notary Public in and for said County and State.

[Endorsed]: Answer of Chandis Securities Company. Filed Apr. 18, 1940. [135]

[Title of District Court and Cause.]

REPLY UNTO ANSWER OF MUTUAL GOLD CORPORATION

For reply unto the answer of Mutual Gold Corporation plaintiffs admit, deny and allege as follows:

I.

Answering unto paragraph four thereof, they deny that said stamp mill was erected by J. A.

Vance, and deny that he was manager, or acting as manager, of defendant Mutual Gold Corporation's properties at the time said stamp mill was erected; deny that said J. A. Vance is the real party in interest herein, and deny that the plaintiffs are nominal plaintiffs only; deny that J. A. Vance induced, or procured, plaintiffs to bring this action, but admits that J. A. Vance has, and will, contribute to [146] the prosecution thereof; deny that said mill was unfit for milling ore; deny that the money expended for said mill was wasted, or lost, to defendant Mutual Gold Corporation through the negligence, incompetency or betrayal of trust of the said J. A. Vance, and deny that said money was wasted, or lost, at all to Mutual Gold Corporation; deny that said developed ore contained no gold recoverable at a profit by the said mill, or by the methods used by J. A. Vance as manager.

II.

For reply unto paragraph six, plaintiffs deny that any of the acts of Frank A. Garbutt, complained of, were in good faith, or taken, or performed, by him in good faith, and deny that any of said acts were had, or done in the belief that they were legal and fair and equitable. Deny that there was no duress, menace, fraud or undue, or improper, influence on the part of Frank A. Garbutt, and deny that there was no intent to circumvent, or violate, the laws of the State of Washington; deny that there was no intent to injure Mutual Gold

Corporation, its stockholders and creditors; deny that said transfers and acts were made and performed with the authorization and approval of the stockholders of defendant Mutual Gold Corporation; deny that there was adequate, or fair, consideration, or any consideration therefor; deny that the executive officers and directors of Mutual Gold Corporation believed said transfers and acts to be for the best interests of the corporation, and its stockholders and creditors, or to be necessary to prevent loss of assets; deny that provision was made by the defendants, or either of them, for payment of the creditors of Mutual Gold Corporation.

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III.

For reply unto the second defense in said answer of Mutual Gold Corporation, the plaintiffs admit, deny and allege:

(1) Deny that plaintiff Helen Maude Lorenz is estopped to bring this action; admit that she gave a proxy to J. E. Stiegler to be voted by him at the meeting of the stockholders held August 6, 1938, but deny the passage of the alleged resolution claimed to have been passed at said meeting, and deny the legality thereof. That the call for said meeting did not include among the purposes of said meeting, the organization by Mutual Gold Corporation of Log Cabin Mines Company, or any new corporation, or subscription to the stock thereof, or

transfer of all, or any, of the assets of Mutual Gold Corporation to any such corporation, nor include proposed authorization of the acts, transactions, or instruments, or any thereof, under attack in the complaint. The proxy given by Helen Maude Lorenz to J. E. Stiegler did not authorize him to vote in support of any such resolution or action, or any resolution of like import.

IV.

For reply unto the third defense in said answer, plaintiffs admit, deny and allege as follows:

(1) Admit that on the 13th day of July, 1939, in the Superior Court of the State of California in and for the County of Los Angeles, there was made and entered in Case No. 440-367, entitled: "Log Cabin Mines Company, a corporation, plaintiff, vs. Mutual Gold Corporation, a corporation, et al, defendants", a purported and pretended final judgment purporting to quiet title [148] to said purchase contract in Log Cabin Mines Company. Plaintiffs deny that said judgment has become final or res adjudicata as against these plaintiffs, or at all. Said judgment was rendered by default solely upon false allegations in the complaint therein that Log Cabin Mines Company was the owner by assignment of the said purchase contract, and that Mutual Gold Corporation wrongfully claimed and asserted an interest therein, whereas, Mutual Gold Corporation was the actual owner, but at the time was disclaiming ownership of the said purchase contract,

and Log Cabin Mines Company had no interest therein except to the extent that it was a trustee for Mutual Gold Corporation in respect thereto.

(2) At the time of the alleged transfer of the purchase contract, an interlocking directorate existed between said two companies, Mutual Gold Corporation and Log Cabin Mines Company, in that G. H. Ferbert and W. L. Grill were members of each thereof, and a majority of the directors of each company were, and have been at all times, dominated and controlled by Frank A. Garbutt, and the action, Case No. 440-367, was brought by Log Cabin Mines Company against Mutual Gold Corporation in collusion between defendants, as part of the plan complained of in the complaint.

(3) None of the plaintiff stockholders, nor any considerable number of stockholders of Mutual Gold Corporation (other than Frank A. Garbutt, W. L. Grill, G. H. Ferbert, J. E. Stiegler and Russell F. Collins) had any knowledge or information of the institution or pendency of said action, or the entry of judgment therein, until the answer in this case was served. The issues in said action were false, sham, feigned, and fictitious, and the [149] court in which judgment was rendered was without jurisdiction of the subject matter, or the cause of action, for that the situs of said purchase contract, and the vendee's interest in the property covered thereby, was in Mono County, California, and not elsewhere. The directors and executive officers of

Mutual Gold Corporation acted in excess of their powers in failing and refusing to defend said action and in permitting judgment to go by default, all with the fraudulent purpose to affirm by said judgment the lodgment of the purchase contract, and the vendee's interest therein, in Log Cabin Mines Company. Said purchase contract, and the vendee's interest therein, was a material, and the main asset of Mutual Gold Corporation, without which it could not carry on its corporate activities.

(4) When said action, Case No. 440-367, was instituted, a stockholders' action, to-wit: Case No. 103 233, was and ever since has been, pending in the Superior Court of the State of Washington for Spokane County, in which A. P. Bateham and E. T. Richter were plaintiffs, and Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company were defendants, which action was a stockholders' suit, brought by the minority stockholders of, and on behalf of, Mutual Gold Corporation, to quiet its title to said purchase contract. The several defendants herein knew of the pendency thereof and of all the proceedings therein, and Log Cabin Mines Company, notwithstanding such knowledge, falsely alleged in the complaint in said action that Mutual Gold Corporation wrongfully claimed an interest in the purchase contract, when in fact Mutual Gold Corporation, by said dominated board of directors, wrongfully refused in said action to claim any interest, but disclaimed any interest, in the purchase contract. [150]

V.

For reply unto the fourth defense in said answer, the plaintiffs admit, deny and allege:

(1) Deny each and every allegation therein contained, and deny the passage of any resolution at said stockholders' meeting of August 6, 1938. The stockholders of Mutual Gold Corporation did not, unanimously or otherwise, by any resolution, authorize Mutual Gold Corporation, its board of directors, or executive officers, to organize, or cause to be organized, Log Cabin Mines Company, or any new corporation, for which Mutual Gold Corporation would subscribe for all, or any part, of the capital stock thereof, or transfer all, or any, of the assets of Mutual Gold Corporation thereto. That no call for stockholders' meeting on said date, or at any other time, informed the stockholders of Mutual Gold Corporation of any purpose, or proposal to organize, or authorize the organization of Log Cabin Mines Company, or any new corporation, or subscribe for the capital stock, of any thereof, of Log Cabin Mines Company, or any new corporation, or transfer all, or any of the assets of Mutual Gold Corporation thereto, and no proxy by any stockholder authorized any holder thereof to vote to authorize the passage of any resolution for any of said purposes. That any such resolution would have been, and was, in violation of the laws of the State of Washington and the public policy of said state, for that no meeting was called, or held, for any of

said purposes, nor lawful approval of the stockholders obtained, as required by the laws of Washington and the public policy of said State. [151]

VI.

For reply unto the fifth defense in said answer, the plaintiffs admit, deny and allege:

(1) Deny that they are not the real parties in interest herein; deny that the real party in interest is J. A. Vance; deny that said suit was brought at his instigation, but admit that he was one, among others, who solicited the plaintiffs to act as such, and that since the action was brought he has contributed to pay the court costs and attorneys' fees incurred therein; deny that any other stockholders' suit has been brought to their knowledge, except a suit brought in the Superior Court of the State of Washington for Spokane County, in which A. P. Batcham and E. T. Richter were plaintiffs and Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company were defendants, in which suit jurisdiction has not been obtained over the subject matter of the cause of action, nor over the persons of any of the defendants, except Mutual Gold Corporation, and which is not upon the cause of action sued on herein. Deny that J. A. Vance has any plan to control Mutual Gold Corporation or its property; deny that this suit was not brought in good faith, or for the benefit of the minority stockholders of the corporation; deny

that the said J. A. Vance is estopped to bring this action.

Wherefore, Plaintiffs pray judgment upon their complaint herein.

W. H. ABEL
O. C. MOORE
FREDERICK D. ANDERSON
Frederick D. Anderson
650 Subway Terminal Bldg.
Los Angeles, California
Attorneys for Plaintiffs.

[Endorsed]: Filed Sep. 3, 1940. [152]

[Title of District Court and Cause.]

REPLY UNTO ANSWER OF FRANK A. GARBUTT, ALICE CLARK RYAN, AND LOG CABIN MINES COMPANY

For reply unto the answer of Frank A. Garbutt, Alice Clark Ryan and Log Cabin Mines Company plaintiffs admit, deny and allege as follows:

I.

Answering unto Paragraph IV thereof, they deny that said stamp mill was erected by J. A. Vance, and deny that he was manager, or acting as manager, of defendant Mutual Gold Corporation's properties at the time said stamp mill was erected; deny that said J. A. Vance is the real party in interest

herein, and deny that the plaintiffs are nominal plaintiffs only; deny that J. A. Vance induced, or procured plaintiffs to bring this action, but admit that J. A. Vance has, and will, contribute to the prosecution thereof; deny that said mill was unfit for milling ore; deny that the money expended for said mill was wasted or lost to defendant Mutual Gold Corporation through the negligence, [153] incompetency or betrayal of trust of the said J. A. Vance, and deny that said money was wasted, or lost at all to Mutual Gold Corporation; deny that said developed ore contained no gold recoverable at a profit by the said mill, or by the methods used by J. A. Vance as manager.

II.

For reply unto Paragraph VII, plaintiffs deny that any of the acts of Frank A. Garbutt complained of were in good faith, or taken or performed by him in good faith, and deny that any of said acts were had, or done, in the belief that they were legal, fair and equitable. Deny that there was no duress, menace, fraud or undue or improper influence on the part of Frank A. Garbutt, and deny that there was no intent to circumvent, or violate the laws of the State of Washington; deny that there was no intent to injure Mutual Gold Corporation, its stockholders and creditors; deny that said transfers and acts were made and performed with the authorization and approval of the

stockholders of defendant Mutual Gold Corporation; deny that there was adequate, or fair consideration, or any consideration, therefor; deny that the executive officers and directors of Mutual Gold Corporation believed said transfers and acts to be for the best interests of the corporation, its stockholders and creditors, or to be necessary to prevent loss of assets; deny that provision was made by the defendants, or either of them, for payment of the creditors of Mutual Gold Corporation.

III.

For reply unto the second defense in said answer, the plaintiffs admit, deny and allege: [154]

(1) Deny that plaintiff Helen Maude Lorenz is estopped to bring this action; admit that she gave a proxy to J. E. Stiegler to be voted by him at the meeting of the stockholders held August 6, 1838, but deny the passage of the alleged resolution claimed to have been passed at said meeting, and deny the legality thereof. That the call for said meeting did not include among the purposes of said meeting, the organization by Mutual Gold Corporation of Log Cabin Mines Company, or any new corporation, or subscription to the stock thereof, or transfer of all, or any, of the assets of Mutual Gold Corporation to any such corporation, nor include proposed authorization of the acts, transactions, or instruments, or any thereof, under attack in the complaint. The proxy given by Helen Maude Lorenz to J. E. Stiegler did not authorize him to vote

in support of any such resolution or action, or any resolution of like import.

IV.

For reply unto the third defense in said answer, plaintiffs admit, deny and allege as follows:

(1) Admit that on the 13th day of July, 1939, in the Superior Court of the State of California in and for the County of Los Angeles, there was made and entered in Case No. 440-367, entitled: "Log Cabin Mines Company, a corporation, plaintiff, vs. Mutual Gold Corporation, a corporation, et al, defendants", a purported and pretended final judgment purporting to quiet title to said purchase contract in Log Cabin Mines Company. Plaintiffs deny that said judgment has become final or res adjudicata as against these plaintiffs, or at all. Said judgment was rendered by default solely upon false allegations in the complaint therein [155] that Log Cabin Mines Company was the owner by assignment of the said purchase contract, and that Mutual Gold Corporation wrongfully claimed and asserted an interest therein, whereas, Mutual Gold Corporation was the actual owner, but at the time was disclaiming ownership of the said purchase contract, and Log Cabin Mines Company had no interest therein except to the extent that it was a trustee for Mutual Gold Corporation in respect thereto.

(2) At the time of the alleged transfer of the purchase contract, an interlocking directorate ex-

isted between said two companies, Mutual Gold Corporation and Log Cabin Mines Company, in that G. H. Ferbert and W. L. Grill were members of each thereof, and a majority of the directors of each company were, and have been at all times, dominated and controlled by Frank A. Garbutt, and the action, Case No. 440-367, was brought by Log Cabin Mines Company against Mutual Gold Corporation in collusion between defendants, as part of the plan complained of in the complaint.

(3) None of the plaintiff stockholders, nor any considerable number of stockholders of Mutual Gold Corporation (other than Frank A. Garbutt, W. L. Grill, G. H. Ferbert, J. E. Stiegler and Russell F. Collins) had any knowledge or information of the institution or pendency of said action, or the entry of judgment therein, until the answer in this case was served. The issues in said action were false, sham, feigned, and fictitious, and the court in which judgment was rendered was without jurisdiction of the subject matter, or the cause of action, for that the situs of said purchase contract, and the vendee's interest in the property covered thereby, was in Mono County, California, and not elsewhere. [156] The directors and executive officers of Mutual Gold Corporation acted in excess of their powers in failing and refusing to defend said action and in permitting judgment to go by default, all with the fraudulent purpose to affirm by said judgment the lodgment of the purchase contract, and the vendee's

interest therein, in Log Cabin Mines Company. Said purchase contract, and the vendee's interest therein, was a material, and the main asset of Mutual Gold Corporation, without which it could not carry on its corporate activities.

(4) When said action, Case No. 440-367, was instituted, a stockholders' action, to-wit: Case No. 103 233, was and ever since has been, pending in the Superior Court of the State of Washington for Spokane County, in which A. P. Batcham and E. T. Richter were plaintiffs, and Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company were defendants, which action was a stockholders' suit, brought by the minority stockholders of, and on behalf of, Mutual Gold Corporation, to quiet its title to said purchase contract. The several defendants herein knew of the pendency thereof and of all the proceedings therein, and Log Cabin Mines Company, notwithstanding such knowledge, falsely alleged in the complaint in said action that Mutual Gold Corporation wrongfully claimed an interest in the purchase contract, when in fact Mutual Gold Corporation, by said dominated board of directors, wrongfully refused in said action to claim any interest, but disclaimed any interest, in the purchase contract.

V.

For reply unto the fourth defense in said answer, the plaintiffs admit, deny and allege: [157]

(1) Deny each and every allegation therein contained, and deny the passage of any resolution at said stockholders' meeting of August 6, 1938. The stockholders of Mutual Gold Corporation did not, unanimously or otherwise, by any resolution, authorize Mutual Gold Corporation, its board of directors, or executive officers, to organize, or cause to be organized, Log Cabin Mines Company, or any new corporation, for which Mutual Gold Corporation would subscribe for all, or any part, of the capital stock thereof, or transfer all, or any, of the assets of Mutual Gold Corporation thereto. That no call for stockholders' meeting on said date, or at any other time, informed the stockholders of Mutual Gold Corporation of any purpose, or proposal, to organize, or authorize the organization of Log Cabin Mines Company, or any new corporation, or subscribe for the capital stock, or any thereof, of Log Cabin Mines Company, or any new corporation, or transfer all, or any of the assets of Mutual Gold Corporation thereto, and no proxy by any stockholder authorized any holder thereof to vote to authorize the passage of any resolution for any of said purposes. That any such resolution would have been, and was, in violation of the laws of the State of Washington and the public policy of said state, for that no meeting was called, or held, for any of said purposes, nor lawful approval of the stockholders obtained, as required by the laws of Washington and the public policy of said state.

VI.

For reply unto the fifth defense in said answer, the plaintiffs admit, deny and allege:

(1) Deny that they are not the real parties in interest herein; [158] deny that the real party in interest is J. A. Vance; deny that said suit was brought at his instigation, but admit that he was one, among others, who solicited the plaintiffs to act as such, and that since the action was brought he has contributed to pay the court costs and attorneys' fees incurred therein; deny that any other stockholders' suit has been brought to their knowledge, except a suit brought in the Superior Court of the State of Washington for Spokane County, in which A. P. Bateham and E. T. Richter were plaintiffs and Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company were defendants, in which suit jurisdiction has not been obtained over the subject matter of the cause of action, nor over the persons of any of the defendants, except Mutual Gold Corporation, and which is not upon the cause of action sued on herein. Deny that J. A. Vance has any plan to control Mutual Gold Corporation or its property; deny that this suit was not brought in good faith, or for the benefit of the minority stockholders of the corporation; deny that the said J. A. Vance is estopped to bring this action.

Wherefore, Plaintiffs pray judgment upon their complaint herein.

W. H. ABEL
O. C. MOORE
FREDERICK D. ANDERSON
650 Subway Terminal Building, Los Angeles, California.
Attorneys for Plaintiffs

[Endorsed]: Filed Sept. 3, 1940. [159]

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday, the 16th day of September, in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable: Ben Harrison, District Judge.

No. 714-BH Civil

HELEN M. SUTHERLAND, et al.,

Plaintiffs,

vs.

FRANK A. GARBUTT, et al.,

Defendants.

CHANDIS SECURITIES CO., a corp.,
Cross-complainant,

vs.

MUTUAL GOLD CORPORATION, a corp.,
LOG CABIN MINES COMPANY, a corp.,
and ALICE CLARK RYAN,
Cross-defendants.

This cause having been heretofore heard by the Court at the trial on evidence both oral and documentary, argument of counsel, both oral and by brief, and was ordered submitted, and the Court having duly considered the record, evidence, pleadings, and the law applicable, and being fully advised in the premises now hands down and orders filed its Memorandum of Opinion, and in accordance therewith orders the cross-complaint dismissed without prejudice, and that defendants are entitled to judgment and are directed to prepare and submit findings of fact and conclusions of law. Memorandum of Opinion filed. [175]

[Title of District Court and Cause.]

MEMORANDUM OPINION

No useful purpose will be served in this memorandum opinion to attempt to set forth a detailed statement of the facts. This case in one sense is a re-enactment of the case of Vance v. Mutual Gold

Corporation, 108 P. 2d, 799, and the recital of facts, in so far as they are pertinent to the case now at issue, is adopted by me as the historical background of this case. While I appreciate the plaintiffs in the two cases are different and the purpose of the litigation is different, yet, at the same time, the present litigation is the outgrowth of the Garbutt contracts mentioned in the Vance case, and for the purpose of this memorandum opinion, I shall discuss the legal [176] effect of the transactions represented by the Garbutt contract Exhibit 13.

The court has been principally concerned as to whether or not said corporation had authority to enter into said contract and the consummation thereof, whereby it transferred all of its assets to the Log Cabin Mines Company. In other words, was said contract and the consummation thereof intra or ultra vires.

This brings me to the question as to whether the Washington statutes of 1932 apply or whether the powers and authority of this corporation were broadened by the amendments of 1933. Plaintiffs contend that the rights of the stockholders were fixed by the state of the law at the time of its incorporation and that it was beyond the power of the legislature to broaden or change said powers by subsequent legislation. I have concluded that this corporation had the powers conferred upon it by the laws of Washington at the time this agreement was entered into. Section 1, Art. XII, of the constitution of Washington provides as follows:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by laws."

Thus it will be seen that Washington followed the practice suggested in the Dartmouth College case and reserved the power to alter or amend the laws controlling existing corporations, and that said constitutional provision became a part of the contract or articles of incorporation and the incorporators and subsequent stockholders became stockholders in said corporation subject to the rights of the state to amend the statutes as provided in said constitutional provision. Looker v. Maynard, 179 U. S. 46; Union Trust Co. v. Moore, 175 Pac. 565, 567; Duke v. Force, 208 Pac. 67; 16 C. J. S., p. 757, Sec. 320. [177]

Sec. 3803-36 Rem. Rev. Stat. provides as follows:

"A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign.

"If the corporation is able to meet its liabilities then matured, such authorization shall be given at a meeting of shareholders, duly called for the purpose, and by such vote of the

shareholders as may be provided for in the articles of incorporation, or, if there be no such specific provision, then by the vote of the holders of two-thirds of the voting power of all shareholders. If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors.

"This section shall not be construed to authorize a conveyance or exchange of assets which would otherwise be in fraud of corporate creditors or of minority shareholders or shareholders without voting rights. (L. '33, sec. 36, p. 798.)"

This section certainly authorizes the transfer of all of the assets to the Log Cabin Mines Company in exchange for stock in the said company. In other words, the transaction was within the power of the corporation. But plaintiffs contend that the notice to stockholders was insufficient. I consider the notice sufficient and the court in the Washington case apparently under findings XII and XIII found that the resolution passed pursuant to said notice was sufficient. The notice and resolution passed in pursuance thereto were broad enough to cover the authorization of the agreement. Even if the notice was insufficient, the board of directors had the authority in view of the fact that the corporation had matured liabilities. If the plaintiffs in the case were dissatisfied with the resolution, they had their remedy under [178] Sec. 3803-41 Rem. Rev. Stat.

Plaintiffs complain that the contract and transfer was in fraud of creditors but the case of Vance v. Mutual Gold Corporation, 108 P. 2d 799-804, disposes of this point when the court stated:

> " * * * Appellants' situation is more favorable than at any time since the formation of the corporation. Respondents' board of directors has not put it out of the power of the company to pay its contracts. On the contrary, the company is in a much better position to pay all of those obligations, including the notes owing to appellants."

Even under the laws of Washington, as they existed in 1932, the transfer would not be ultra vires under Logie v. Mother Lode Copper Mines Co. of Alaska, 179 Pac. 835. I agree with defendants that this case is authority for the condemned acts of the Mutual Gold Company. The articles of the Mutual Gold were sufficiently broad to permit the transfer or exchange. Plaintiffs place great reliance upon the case of Moore v. Los Lugos Gold Mines, 21 P. 2d, 253, but that case involves primarily the contractual relationship between the stockholders and the corporation, wherein certain non-assessable stock was issued and presents an entirely different factual situation from the case before me or as set forth in Logie v. Mother Lode Copper Mines, supra. In this case we have in a sense no vested contractual rights involved. Theis v. Spokane Falls Gaslight Co., 74 Pac. 1004, antidates the amendment of 1933 and deals with a going prosperous concern, beside it ap-

pears that this case has been specifically overruled by Lange v. Reservation Mining and Smelting Co., 93 Pac. 208. The case of Child v. Idaho Hewer Mines, 284 Pac. 80, familiar to counsel for plaintiff also supports my conclusion. I realize that it is difficult to reconcile many of the authorities but the rights of the stockholders when made non-assessable by the articles of incorporation are always protected. (16 C. J. S. 759.) Thompson on Corporations, Third Ed. Vol. 1, sec. 429. [179]

It is interesting to note under the authority of Moore v. Los Lugos Gold Mines, supra, that the defendants might very easily be deemed guilty of laches (see page 264-5).

It must be remembered that Subdivision (b) of Article 2 of the Articles of Incorporation of Mutual Gold provides as follows:

> "To acquire by purchase or exchange, or in any other manner, in the United States or in Foreign Countries, mining claims, grounds or lodes, mining and mineral rights, concessions or grants, or any interest therein, and to sell, exchange, lease or in any other manner to dispose of the whole or any part thereof or any interest therein when desirable."

In Pitcher v. Lone Pine-Surprise Consol. Min. Co., 81 Pac. 1049, the Supreme Court of Washington stated:

> "The selling of these mines was not an act ultra vires. The articles of incorporation, among other things, recite, '*The purpose for which this*

> *corporation is formed are to work, operate, buy, sell, lease, locate, acquire, procure, hold and deal in mines,'* etc. The trustees, therefore, had the power to sell these mines."

As far as I can ascertain this case has never been overruled. It would, therefore, appear under this authority that the acts of the corporation were not ultra vires.

In view of my conclusions, Hirschfeld v. McKinley, 78 F. (2d), 124, 131, and Cecil B. DeMille Productions v. Woolery, 61 F. (2d), 45, have no bearing on the case at bar.

Coombes v. Getz, 285 U. S. 434 and Ettor v. City of Tacoma, 228 U. S. 148, both involve vested rights at the time the law was changed, while in this case, the law had been changed long prior to the transactions under attack. For a fine distinction see Rainey v. Michel, 57 P. 2d. 932; (105 A. L. R. 148).

I do not hold there was a sale, nor do I look upon the transaction [180] as a conversion. I further feel that the consideration was adequate.

Plaintiffs insist that the transaction was not a sale, and if it was a sale, it should have been for cash. The court, as stated before, does not consider the transaction a sale but an exchange for the purpose of creating an operating company. Plaintiffs also attack the power of exchange and cite 63 A. L. R. 1004, but as heretofore pointed out the statutes and the articles of incorporation are broad enough to cover such exchange. (See other notes in 63 A. L. R. 1004.)

Plaintiffs have raised many points and showered the court with citations. I have examined the same with care and for the purpose of assisting counsel in the preparation of findings make the following comments:

1. The Log Cabin was not set up to evade the law.

2. The Log Cabin was not set up to evade a contract.

3. Mutual Gold did not incorporate Log Cabin.

4. The transaction was not a dissolution.

5. The transaction did not involve a reduction of capital stock.

6. Garbutt was not guilty of fraud, duress or coercion.

I am of the opinion that all parties acted in good faith. The directors were faced with a serious situation and can see no fraud because they preferred to deal with Garbutt instead of Vance. The plaintiffs infer fraud at every step but I find against them in that respect.

This case looks to me like the kettle calling the pot black. The entire trouble developed when Vance was unable to put over his deal. At the time he submitted his proposition to the corporation he undoubtedly thought the corporation had no other alternative but to accept it but when the directors, through their own initiative, worked out a deal with Garbutt, the fur began to fly. From that time on it has been a battle royal, and it is a reasonable inference that the real [181] party in interest in this

case is J. A. Vance. (See Mrs. Sutherland's deposition.) This inference can also be drawn from the fact that the same counsel appearing in this action also appeared in the Washington case; that Vance was personally present at the trial and that the combined holdings of the plaintiffs would not justify either the institution or prosecution of this action.

I appreciate the fact that at the trial I refused to allow the defendants to go into this phase of the case (See Transcript p. 333), but evidently under the authorities of Pitcher v. Lone-Pine-Surprise Consol. Min. Co., supra: Breeze v. Lone Pine-Surprise Consol. Min. Co., 81 Pac. 1050, and Speckert v. Bunker Hill Arizona Min. Co., 106 P. 2d 602, I was in error.

The findings in the trial court in Washington covered much of the ground covered in this case. My conclusions are similar to Judge Greenough's and I adopt findings XII, XIII, XIV, XV and XVI. I also adopt his conclusions of law, Nos. I and IV.

By reason of a stipulation on file, the cross-complaint is dismissed without prejudice.

Defendants are entitled to judgment and are directed to prepare and submit findings of fact.

Dated: Los Angeles, California, September 16, 1941.

BEN HARRISON
Judge.

[Endorsed]: Filed Sept. 16, 1941 [182]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on for trial on March 18, 1941, at 10 o'clock a. m., and was thereafter on that day and on March 19, 20, and 21, 1941, tried before the Honorable Ben Harrison, Judge presiding, a trial by jury having been waived by the parties to said action. Plaintiffs did not appear in person, but appeared by their attorney Frederick D. Anderson, Esq., on whose motion W. H. Abel, Esq., and O. C. Moore, Esq. of the State of Washington were admitted by the Court to practice before it in this case and to be associated with said Frederick D. Anderson as attorneys for the plaintiffs. Defendant Frank A. Garbutt and defendant and [185] cross-defendant Alice Clark Ryan appeared in person and by their attorney David E. Hinckle, Esq.; defendants and cross-defendants Log Cabin Mines Company, a corporation, and Mutual Gold Corporation, a corporation, appeared by their attorney said David E. Hinckle, on whose motion William L. Grill, Esq. of the State of Washington was admitted by the Court to practice before it in this case and to be substituted for said David E. Hinckle as attorney for said Mutual Gold Corporation. Thereafter, and until the Court adjourned on March 20, 1941, defendant and cross-defendant Mutual Gold Corporation was represented by said William L. Grill as its attorney, at which time, on his

motion he withdrew as such attorney and said David E. Hinckle was substituted for him. Defendant and cross-complainant Chandis Securities Company, a corporation, appeared by its attorney Richard G. Adams, Esq.

Both oral and documentary evidence were introduced by the respective parties. Thereafter the cause was orally argued for the plaintiffs to the Court, and was briefed by the parties. On September 12, 1941, defendants and cross-defendants stipulated in writing with cross-complainant, by and through their respective attorneys, that the cross-complaint filed herein be dismissed without prejudice. On September 16, 1941, the Court ordered said cross-complaint dismissed without prejudice pursuant to said stipulation, and ordered judgment for the defendants against the plaintiffs.

And the Court, being fully advised in the premises, now makes its findings of fact and its conclusions of law as follows:

Findings of Fact

I.

Plaintiffs Helen M. Sutherland and Charles W. Sutherland are citizens of the Dominion of Canada. Plaintiffs M. I. Higgens and Maybelle Higgens are citizens of the State of Idaho. Plaintiff Helen Maude Lorenz is a citizen of the State of Oregon. [186] Defendant Frank A. Garbutt and defendant and cross-defendant Alice Clark Ryan are citizens of the State of California.

II.

Defendant and cross-defendant Log Cabin Mines Company is a corporation organized under the laws of the State of California. Defendant and cross-complainant Chandis Securities Company is a corporation organized under the laws of the State of California.

III.

Defendant and cross-defendant Mutual Gold Corporation was organized as a corporation under the laws of the State of Washington on May 11, 1932, and is now a corporation organized and existing under said laws. On November 8, 1933, Mutual Gold Corporation was duly qualified under the laws of the State of California to engage in business therein, and ever since has been so qualified.

IV.

Mutual Gold Corporation's Articles of Incorporation provide that the objects and purposes for which the corporation is organized are, among others, to sell, exchange, lease, or in any other manner to dispose of the whole or any part of its mining claims, grounds or lodes, mining and mineral rights, concessions, or grants, or any interest therein when desirable, and to buy, sell, and otherwise deal in ores, metals, plants, machinery, tools, implements, groceries, provisions, clothing, boots and shoes, hardware, wooden and metallic ware, and all other articles and things in anywise required or capable of being used in connection with mining operations.

V.

Mutual Gold Corporation has outstanding 2,641,-182 shares of capital stock. At the time the acts complained of were performed, and at all times since, plaintiffs Helen M. Sutherland and Charles W. Sutherland each owned 333 of said shares; plaintiffs M. I. Higgens and Maybelle Higgens each owned 333⅓ of said [187] shares, and plaintiff Helen Maude Lorenz owned 500 of said shares.

VI.

Plaintiffs brought and maintain this action as stockholders of, and for and on behalf of Mutual Gold Corporation, and for and on behalf of all the stockholders of Mutual Gold Corporation similarly situated, a controlling majority of the directors and a majority of the stockholders of that corporation being opposed to the bringing of such suit.

VII.

The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

VIII.

On July 13, 1932, Chandis Securities Company, Mrs. M. N. Clark, and Alice Clark Ryan, as owners of eighteen lode gold mining claims in Mono County, California, entered into a written contract to sell said claims for $150,000.00 to Russell F. Collins and Ben L. Collins, a copy of said contract being in evidence as Exhibit 2, and being hereby made a part of these findings. Mutual Gold Corporation was or-

EXHIBIT 2 is set forth in Complaint, as Exhibit 1 thereto, at page 23.

ganized, and on July 18, 1932, the contract was assigned to it with the consent of the sellers, said corporation assuming the buyers' obligations. The contract was amended in 1934 by written instrument, in evidence as Exhibit 3 and hereby made a part of these findings. Mrs. M. N. Clark's interest in the contract and said claims was transferred in 1935 to Alice Clark Ryan. Said contract was amended again in 1936 by written instrument, in evidence as Exhibit 4 and hereby made a part of these findings. Frank A. Garbutt acted as agent for the owners in negotiating the contract and the amendments, and continued to represent them until October 3, 1938, but not thereafter. Said contract as amended called for a payment of $10,000.00 on November 1 in each of the years 1937, 1938, 1939, and 1940 to the sellers, and payment of the whole balance of the purchase price on November 1, [188] 1941, and required that said claims should be developed, that when sufficient tonnage of commercial ore was in sight to justify it a mill suitable for economical milling should be erected, and that ore should be milled.

IX.

Mutual Gold Corporation paid a total of $20,000.00 on said purchase price and expended in excess of $150,000.00 in the performance of its contract with the sellers up to April, 1938, at which time operations ceased because funds available for operating had been exhausted.

EXHIBIT 3 is set forth in Complaint, as Exhibit 2 thereto, at page 38.

EXHIBIT 4 is set forth in Complaint, as Exhibit 4 thereto, at page 45.

X.

In July, 1938, Mutual Gold Corporation was in need of funds to build a mill in place of the pilot mill which it had been operating. Thereupon Lloyd J. Vance, son of J. A. Vance, for himself and J. A. Vance, submitted to Mutual Gold Corporation in writing a plan which is in evidence as part of Exhibit 5 and is made a part of these findings. At a meeting held July 18, 1938, the directors of Mutual Gold Corporation adopted a resolution as follows:

> "Resolved that the offer of Lloyd Vance as submitted to this meeting, (copy of which is spread upon the minutes) when changed and altered in conformity with the changes hereinbefore set out in these minutes, be and the same is hereby received, approved and recommended to the stockholders for acceptance; that the annual meeting of the stockholders be called and held as soon as possible and not later than the 6th day of August, A. D., 1938, at the hour of 11:00 o'clock A. M. for the purpose of electing a Board of Directors and approving and acting upon the offer of the said Lloyd Vance for the sale and disposition of the undivided one-half interest in and to the holdings of the company, and authorizing and empowering the Board of Directors to sell or otherwise dispose of the whole or [189] any part of the assets of the corporation at such time or times and on such terms and conditions as they may deem adequate, and to form and enter into any working

EXHIBIT 5 is set forth in Reporter's Transcript at page 230.

agreement along the lines as contemplated by the offer of said Lloyd Vance, or such other or different agreement as they may, in their absolute discretion deem advisable, and to transact any and all other business that may come before said meeting, and that the Secretary be and she is hereby authorized, empowered, and instructed to set the date of such meeting at the earliest moment possible as provided by law and the by-laws of this corporation, and that a letter be sent with the notice of such meeting to all the stockholders advising them fully with respect to the necessity of some such action and covering the activities of the company since the last report to them made under date of April 5, 1938, such le*yy*er to be approved and signed by Mr. J. E. Stiegler as President; and that Wednesday, the 20th day of July A. D., 1938, at 12:00 o'clock noon be and the same is hereby fixed as a recorded date for the determination of the shareholders entitled to notice of such meeting."

Said Vance offer was supplemented by a letter written by Lloyd Vance to the corporation on August 12, 1938, said letter being in evidence as Exhibit 98 and being hereby made a part of these findings. Said J. A. Vance was the largest creditor, a large stockholder, a director, and vice president of Mutual Gold Corporation, and had entered into a contract dated August 29, 1936, with said corpora-

EXHIBIT 98 is set forth in Reporter's Transcript at page 667.

tion to act as its general manager, said contract being in evidence as Exhibit 78.

XI.

On or about July 20, 1938, notice of the annual meeting of stockholders to be held on August 6, 1938, in Spokane, Washington, was mailed to the stockholders of the Mutual Gold Corporation. Said notice is in evidence as Exhibit 6, and sets forth that the [190] meeting would be held——

> "To authorize, empoyer and direct the Board of Directors to accept the offer of Lloyd Vance as outlined in the letter of the President under date of July 20th, 1938, a copy of which letter is herewith enclosed, and by reference made a part hereof, and/or authorize, empower and direct the Board of Directors to make and enter into such other or different deal with Lloyd Vance, or any other person or corporation, with respect to all of the assets of this corporation, the management, control and operation thereof, the division of the profits thereof or otherwise as such Board of Directors shall, in their absolute discretion, deem expedient, advisable or desirable.
>
> "To authorize and empower the Board of Directors to sell, lease, exchange or otherwise dispose of all of the assets of this corporation at such time or times, for such price and upon such terms and conditions, for cash or otherwise, as they shall, in their absolute discretion

EXHIBIT 78 is set forth in Complaint, as Exhibit 3 thereto, at page 42.

deem expedient, advisable or desirable, including the exchanging for shares in another corporation, domestic or foreign."

XII.

The letter of the President under date of July 20, 1938, referred to in said notice, is in evidence as Exhibit 8, is addressed to the stockholders, and accompanied the said notice. After summarizing the Lloyd Vance proposal, it stated:

"You will be asked to approve the offer (referring to that of Lloyd Vance) and authorize the Board to execute such contract as they shall deem advisable, and will also be requested to authorize them to sell or otherwise dispose of the whole or any part of the assets of the Mutual Gold Corporation at such time or times, and on such terms and conditions as they shall, in their absolute discretion, [191] deem adequate so that they may be placed in a position to dispose of the whole or any part of the property, and have full authority to do so should they find it necessary or advisable."

XIII.

The meeting of the stockholders was held August 6, 1938, pursuant to said notice. The stock present and entitled to vote was as follows:

Present in person	856,404	shares
Present by proxy	1,105,953	"
Present by endorsed certificates	22,250	"
Total present and entitled to vote	1,984,607	"

The total issued outstanding stock was 2,633,830 shares. At said meeting 649,223 shares or said issued stock was not present or represented, and did not vote. Each of the proxies voted thereat was in the form in evidence as Exhibit 7, hereby made a part of these findings, which form was as follows:

"Proxy

"Know All Men by These Presents; That I, the undersigned hereby constitute and appoint J. E. Stiegler, or J. A. Vance or..... with power of substitution, my attorneys and proxies to appear and vote at the Annual Meeting of Stockholders of the Mutual Gold Corporation to be held at 401 Fernwell Building, Spokane, Washington, Saturday, August 6th, 1938, at 11:00 o'clock A. M., and at any and all adjournments thereof for the following purposes:

"1. To elect a Board of Directors.

"2. To approve, ratify and confirm the acts and proceedings of the Board of Directors and Officers of the corporation, since the last Annual Meeting of Stockholders. [192]

"3. To authorize, empower and direct the Board of Directors to accept the offer of Lloyd Vance as outlined in the letter of the President under date of July 20th, 1938, a copy of which letter is herewith enclosed, and by reference made a part hereof, and/or authorize, empower and direct the Board of Directors to make and

enter into such other or different deal with Lloyd Vance, or any other person or corporation, with respect to all of the assets of this corporation, the management, control and operation thereof, the division of the profits thereof or otherwise, as such Board of Directors shall, in their absolute discretion, deem expedient, advisable or desirable.

"4. To authorize and empower the Board of Directors to sell, lease, exchange or otherwise dispose of all of the assets of this corporation at such time or times, for such price and upon such terms and conditions, for cash or otherwise, as they shall, in their absolute discretion deem expedient, advisable or desirable, including the exchanging for shares in another corporation, domestic or foreign.

"5. To take action upon and transact any other business which may properly and lawfully come before the meeting.

"The undersigned hereby ratifies and confirms all that either of said persons, or their substitute, may lawfully do at said meeting.

'Dated this 21st day of July, A. D., 1938.

(Seal) .....

"Witness:

....."

XIV.

At said meeting, the following resolution was adopted, [193] all of said 1,984,607 shares being cast therefor:

"Resolved that the Board of Directors of this corporation be and they are hereby authorized, empowered, and directed to sell, lease, deal with, operate, exchange, or otherwise dispose of, to any person, persons or corporation desiring to purchase, lease, deal with, exchange, or operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection which in their judgment they may deem necessary or advisable."

XV.

At the time said resolution was adopted on August 6, 1938, Mutual Gold Corporation was not able to meet its obligations then matured, the amount of which is set out in paragraph XXXV of these findings, and at no time thereafter and prior to the performance of the acts in this action complained of was it able to meet them.

XVI.

In August, 1938, the directors of the corporation sought and obtained from Frank A. Garbutt an agreement to finance the corporation on certain terms and conditions which were incorporated in a contract between him and the corporation dated

September 2, 1938. Said contract provided that he was to take over the corporation's assets and develop and operate its mining properties. It is in evidence as Exhibit 13, and is hereby made a part of these findings.

XVII.

Pursuant to resolution of the board of directors of Mutual [194] Gold Corporation passed September 7, 1938, a special meeting of the stockholders was called for September 24, 1938, for the purpose of ratifying or refusing to ratify the contract of September 2, 1938, between Mutual Gold Corporation and Frank A. Garbutt. Notice thereof, in evidence as Exhibit 17, and form of proxy, in evidence as Exhibit 18, were mailed to the stockholders. At a meeting of the board of directors of Mutual Gold Corporation held September 19, 1938, the Board of Directors adopted a motion requiring the secretary to advise the stockholders that said meeting of stockholders called for September 24, 1938, had been called off by the board. Said proposed meeting of September 24, 1938, was never held.

XVIII.

On September 22, 1938, said contract with Frank A. Garbutt was re-executed pursuant to a resolution of said board of directors adopted at a meeting regularly called and held on September 7, 1938, which provided that—

> "In view of the authority and power given to the board of directors by the stockholders at

EXHIBIT 13 is set forth in Complaint, as Exhibit 6 thereto, at page 51.

EXHIBIT 17 is set forth in Reporter's Transcript at page 295.

EXHIBIT 18 is set forth in Reporter's Transcript at page 296.

a special meeting of the stockholders called on the 6th day of August, 1938, and in view of the present financial condition of the company, this corporation do, and it hereby does, accept that certain contract bearing date the 2d day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, and all of the terms and provisions thereof; and that the president of this corporation, Mr. J. E. Stiegler, be and he hereby is authorized and directed to execute said contract, if the previous ratification thereof is not legally sufficient, for and on behalf of this corporation, and to execute any and all documents, papers, bills of sale, deeds, and conveyances necessary to make said document legally effective and to carry out the terms and conditions [195] and provisions thereof."

XIX.

Mutual Gold Corporation executed its mining deed bearing date of September 21, in evidence as Exhibit 23, conveying said eighteen claims and others to Frank A. Garbutt, and executed its assignment bearing date of September 21, 1938, in evidence as Exhibit 24, transferring said purchase contract of July 13, 1932, to Mr. Garbutt, and executed its bill of sale bearing date of September 22, 1938, in evidence as Exhibit 25, transferring to Mr. Garbutt said corporation's mining machinery, tools, supplies, and equipment, including its automotive

EXHIBIT 23 is set forth in Complaint, as Exhibit 7 thereto, at page 58.

EXHIBIT 24 is set forth in Complaint, as Exhibit 8 thereto, at page 60.

EXHIBIT 25 is set forth in Complaint, as Exhibit 9 thereto, at page 62.

equipment. Said deed, assignment, and bill of sale were made to Frank A. Garbutt in trust for a corporation to be formed.

XX.

Log Cabin Mines Company was organized under the laws of the State of California on October 18, 1838, at the instance and under the direction of Frank A. Garbutt, with a capital stock of 10,000 shares having a par value of $1.00 a share. The majority of the board of directors were at all times selected by Frank A. Garbutt and he at all times after the issue of its capital stock owned a majority thereof.

XXI.

Said Log Cabin Mines Company was not organized by or for Mutual Gold Corporation. The organization and incorporation of Log Cabin Mines Company or any other new corporation by, or for, Mutual Gold Corporation was never submitted to, or authorized by, the stockholders of Mutual Gold Corporation, at any meeting called or held for that purpose.

XXII.

Said Log Cabin Mines Company was organized for the express purpose of acquiring all the property and assets of Mutual Gold Corporation and operating the same, and it has never engaged in [196] any other business than operating said properties.

XXIII.

Frank A. Garbutt's relationship to Log Cabin Mines Company at all times subsequent to its organization was as promotor, trustee, general manager, principal stockholder, and principal creditor.

XXIV.

It was impossible to operate the Mutual Gold Corporation properties on the proceeds of a capitalization of Log Cabin Mines Company of ten thousand dollars ($10,000.00) at one dollar ($1.00) per share, which fact was at all times well known to Frank A. Garbutt and all other parties to this litigation.

XXV.

Frank A. Garbutt proceeded to advance money and to do the things he had agreed to do, including the payment to the sellers of $10,000.00 on November 1, 1938, for Mutual Gold Corporation.

XXVI.

On October 31, 1938, Frank A. Garbutt gave Mutual Gold Corporation notice of termination of said contracts of September 2, 1938, and September 22, 1938, and at the same time Mutual Gold Corporation and Frank A. Garbutt entered into an agreement dated November 1, 1938, terminating said contracts and making Frank A. Garbutt trustee for Mutual Gold Corporation of the transferred properties. The action of the officers in executing said agreement was approved by the board of directors of Mutual Gold Corporation November 7, 1938. Said

notice of October 31, 1938, and said agreement of November 1, 1938, are in evidence as Exhibit 32 and are hereby made a part of these findings.

XXVII.

On December 17, 1938, the board of directors of Mutual Gold Corporation adopted the following resolution:

"Whereas this corporation has been negotiating for some few weeks with Mr. Frank A. Garbutt for a contract [197] along the lines of the contract made with him on or about September 2 and 22, 1938; and Whereas, the terms of such contract have been practically agreed upon; and Whereas, the form of such contract has been read to and studied by the board; and Whereas, it will be for the best interests of this company that said contract be entered into; now, therefore, Be It Resolved that this company enter into said contract with said Frank A. Garbutt, which contract has been fully read, discussed and studied by the board; and Be It Further Resolved, that the President of this corporation be and he hereby is authorized and directed to deliver said contract to said Frank A. Garbutt and to Log Cabin Mines Company, a corporation."

XXVIII.

Thereafter Mutual Gold Corporation entered into a contract with Frank A. Garbutt and Log Cabin Mines Company, dated December 17, 1938, whereby Frank A. Garbutt became trustee of said transferred

EXHIBIT 32 is set forth in Complaint, as Exhibit 10 thereto, at page 65.

properties for Log Cabin Mines Company, and wherein for a valuable consideration the said Log Cabin Mines Company undertook to become the operating company in carrying on the development and operation of said mining property. Said contract is in evidence as Exhibit 40, and is hereby made a part of these findings.

XXIX.

At the next annual meeting of Mutual Gold Corporation's stockholders held on February 1, 1939, the contract of December 17, 1938 (Exhibit 40 above referred to) was ratified by a resolution of the stockholders. Neither the notice of said meeting, in evidence as Exhibit 94 and hereby made a part of these findings, nor the proxy form solicited by the management, in evidence as Exhibit 95 and hereby made a part of these findings, contained any reference to such proposed action of the stockholders. The stock present at said meeting and entitled to vote was as follows: [198]

Present in person	164,114 shares
Present by proxy	2,149,342 "
Total present and entitled to vote	2,313,456 "

The vote upon said resolution ratifying the said contract of December 17, 1938, was as follows:

Shares voting for	1,458,969⅓
Shares voting against	841,153⅔

EXHIBIT 40 is set forth in Complaint, as Exhibit 11 thereto, at page 69.
EXHIBIT 94 is set forth in Reporter's Transcript at page 606.
EXHIBIT 95 is set forth in Reporter's Transcript at page 607.

Said contract was also approved by resolution of the board of directors held on June 6, 1939.

XXX.

On October 20, 1938, S. C. Hall, a friend of Frank A. Garbutt's made a subscription to the capital stock of Log Cabin Mines Company. He cancelled the subscription on November 2, 1938. No further stock subscription was made until on or about April 17, 1939, when Mutual Gold Corporation subscribed for the entire capital stock and borrowed ten thousand dollars ($10,000.00) from Frank A. Garbutt to pay therefor. Frank A. Garbutt and Mutual Gold Corporation executed certain deeds, assignments, and bills of sale to Log Cabin Mines Company, the first of which was on March 10, 1939, said documents being in evidence as Exhibits 45, 46, 47, 52, and 0. Thus, from the date of its organization to March 10, 1939, Log Cabin Mines Company was entirely without assets.

XXXI.

The subscription to and purchase of said Log Cabin Mines Company shares by Mutual Gold Corporation had been authorized by resolution of Mutual Gold Corporation's board of directors, and the borrowing of said $10,000.00 from Frank A. Garbutt to pay for said shares had been authorized by resolution of said board on October 21, 1938. Said resolution read as follows:

"Be It Further Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill are hereby authorized

EXHIBIT 45 is set forth in Complaint, as Exhibit 12 thereto, at page 84.
EXHIBIT 46 is set forth in Complaint, as Exhibit 13 thereto, at page 88.
EXHIBIT 47 is set forth in Complaint, as Exhibit 14 thereto, at page 92.
EXHIBIT 52 is set forth in Complaint, as Exhibit 15 thereto, at page 94.
EXHIBIT O is set forth in the Reporter's Transcript at page 548.

and directed to arrange, if they deem it advisable, for the organization of [199] a new corporation under the laws of California or any other state, with a par value of $10,000, divided into 10,000 shares, or such other par value or number of shares as they may deem advisable, and to subscribe to said shares for and on behalf of the Mutual Gold Corporation.

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill be and they are hereby authorized and directed to negotiate a loan in the sum of $10,000 to pay for the subscription of $10,000 to the new company in the event that a new company is organized."

XXXII

Said stock was issued on or about April 17, 1939, to Mutual Gold Corporation for $10,000.00 cash, and was deposited in escrow in Los Angeles, California, under order of the California Commissioner of Corporations. Thereafter, Mutual Gold Corporation transferred 5001 of said shares to Frank A. Garbutt pursuant to the terms of said contract of December 17, 1938. Said Mutual Gold Corporation still retains the remaining 4,999 of said shares, which are still in said escrow and have never been pledged or otherwise encumbered.

XXXIII.

The said deeds, assignments, and bills of sale to Log Cabin Mines Company transferred to that com-

pany both those of Mutual Gold Corporation's assets that had been previously transferred to Frank A. Garbutt and those which had not, with the exception of some tailings and the surface of the ground on which they lay. Said transfers to Log Cabin Mines Company were in exchange for its stock issued to Mutual Gold Corporation.

XXXIV.

The transfer of said assets of Mutual Gold Corporation to Log Cabin Mines Company was made upon a consideration which was not cash. [200]

XXXV.

The obligations of Mutual Gold Corporation at the time said transfers were made and on August 6, 1938 and at all times thereafter were (1) approximately $1,835.37 absolutely due and payable; (2) open accounts on production certificates $1,008.07, with interest thereon, not due; (3) $30,000.00 represented by production notes according to the terms of the form of production note in evidence as Exhibit 69 and made a part of these findings, (4) open accounts with stockholders $22,785.04 not due; and (5) the unpaid balance of the purchase price under said contract of July 13, 1932.

XXXVI.

On April 17, 1939, said Log Cabin Mines Company employed Frank A. Garbutt as manager, and he has so acted at all times since without salary.

XXXVII.

The said contract executed on September 2, 1938 and reexecuted on September 22, 1938, and said contract executed as of December 17, 1938 were made by the board of directors of Mutual Gold Corporation with the purpose and intent that out of the net proceeds from said mining property, Mutual Gold Corporation would pay all its outstanding indebtedness; and on August 23, 1939, in order that there might be no question as to their intention, the said board of directors entered into a supplemental agreement with Frank A. Garbutt and Log Cabin Mines Company specifically providing that after the repayment of the amounts advanced by the operating company for labor and machinery and any other expenses as in said contract provided, the net proceeds from said mining property belonging and accruing to Mutual Gold Corporation should first be paid to discharge said indebtedness. Said supplemental agreement is in evidence as Exhibit J, and is hereby made a part of these findings.

XXXVIII.

Since the making of said contracts, Log Cabin Mines Company and Frank A. Garbutt have expended labor and money in the de- [201] velopment of the said mining property, installing thereon a new mill capable of milling in excess of 100 tons of ore per day, together with other proper machinery and equipment, so that the total expense of equipping and developing said property by the

EXHIBIT J is set forth in Reporter's Transcript at page 520.

said Log Cabin Mines Company and Frank A. Garbutt since the making of said contracts has exceeded the sum of $100,000.00. They have milled approximately 48,500 tons of ore, for which approximately $265,000.00 has been received. They have paid the owners $20,000.00 out of this on the purchase price of the said eighteen claims, and substantially all the remainder has been expended in operating, developing, and protecting the mining property. None of the money advanced by Frank A. Garbutt has been repaid to him and no interest thereon has been paid, except that Mutual Gold Corporation is entitled to a credit of $5,001.00 for the 5,001 shares of Log Cabin Mines Company stock transferred to him. All ore extracted from the property by Frank A. Garbutt and Log Cabin Mines Company, and all proceeds therefrom, have been accounted for to Mutual Gold Corporation.

XXXIX.

None of the said acts of the Mutual Gold Corporation or of its officers or directors, or of Log Cabin Mines Company or of its directors or officers, or of Chandis Securities Company or of its directors or officers, or of Frank A. Garbutt, or of Alice Clark Ryan, was performed to evade, or circumvent, or violate the laws of the State of Washington or any law, or to evade Mutual Gold Corporation's said contract of August 29, 1936 with J. A. Vance or any other contract or obligation of Mutual Gold Corporation, or to evade any contract or obligation of

any of the other said defendants, or to injure Mutual Gold Corporation or its stockholders or creditors or any one, or with the intent to defraud any one of any right or property, or pursuant to any conspiracy; but each act of all said defendants and officers and di- [202] rectors was done in good faith and in the belief that the best interest of Mutual Gold Corporation and its stockholders and creditors was being served thereby, and with the intent that such interests would be so served.

XL.

No act of any of said corporations or of their respective officers or directors, or of Alice Clark Ryan, was induced or influenced by any fraud, duress, or coercion of Frank A. Garbutt or of any other person.

XLI.

Frank A. Garbutt has not converted any mineral, ore, or other property of Mutual Gold Corporation's to his own use.

XLII.

Said contract of July 13, 1932 for the purchase of said mining claims is in good standing and not in danger of being terminated because of any failure to pay the sellers any installment payment on the purchase price of said claims.

From the foregoing Findings of Fact, the court makes the following—

CONCLUSIONS OF LAW

I.

The transactions set forth in the foregoing findings of fact constituted an exchange of the assets of Mutual Gold Corporation for half the capital stock, less one share, of Log Cabin Mines Company, and did not constitute and were not equivalent to a sale of the assets of, or a reduction of the capital stock of, or a dissolution of Mutual Gold Corporation.

II.

Such exchange was and is authorized by the Articles of Incorporation of Mutual Gold Corporation and by its stockholders [203] and directors, and by the laws of the State of Washington.

III.

Mutual Gold Corporation did not by such exchange put it out of its power to pay its obligations out of net production receipts accruing from the sale of ores or minerals extracted from ores from its mining property, and did not jeopardize or interfere with the rights of its creditors or its stockholders.

IV.

The board of directors of Mutual Gold Corporation, in authorizing the execution of the said contracts and instruments for the development and operation of its mining properties acted without fraud and in the exercise of their sound discretion.

V.

The acts of the defendants did not constitute fraud, either actual or constructive.

VI.

There was adequate consideration for said exchange and the executing of said contracts and instruments; and said exchange, contracts, and instruments are valid and legal.

VII.

The force, effect, and validity of the purchase contract of July 13, 1932 have not been destroyed or impaired by any act of the defendants.

VIII.

Defendants are entitled to judgment that plaintiffs take nothing by this action and that defendants shall recover their costs from the plaintiffs.

IX.

By reason of the stipulation filed herein, cross-defendants are entitled to a judgment that the cross-complaint be dismissed without prejudice and without costs to either cross-defendants or cross-complainant. [204]

Let judgment be rendered and entered accordingly.

Done in open court this 30 day of October, 1941.

BEN HARRISON

Judge

[Endorsed]: Filed Oct. 30, 1941. [205]

In the District Court of the United States
Southern District of California
Central Division

No. 714-BH

HELEN M. SUTHERLAND, CHAS. W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS, and HELEN MAUDE LORENZ,
Plaintiffs,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,
Defendants.

CHANDIS SECURITIES COMPANY, a corporation,
Cross-Complainant,

vs.

MUTUAL GOLD CORPORATION, a corporation, LOG CABIN MINES COMPANY, a corporation, and ALICE CLARK RYAN,
Cross-Defendants.

JUDGMENT

The above-entitled cause came on for trial on March 18, 1941, at 10 o'clock a.m., and was thereafter on that day and on March 19, 20, and 21, 1941

tried before the Honorable Ben Harrison, Judge presiding, a trial by jury having been waived by the parties to said action. Plaintiffs did not appear in person, but appeared by their attorney Frederick D. Anderson, Esq., on whose motion W. H. Abel, Esq. and O. C. Moore, Esq., of the State of Washington were admitted by the Court to practice before it in this case and to be associated with said Frederick D. Anderson as attorneys for the plaintiffs. Defendant Frank A. Garbutt and defendant and [207] cross-defendant Alice Clark Ryan appeared in person and by their attorney David E. Hinckle, Esq.; defendants and cross-defendants Log Cabin Mines Company, a corporation, and Mutual Gold Corporation, a corporation, appeared by their attorney said David E. Hinckle, on whose motion William L. Grill, Esq. of the State of Washington was admitted by the Court to practice before it in this case and to be substituted for said David E. Hinckle as attorney for said Mutual Gold Corporation. Thereafter, and until the Court adjourned on March 20, 1941, defendant and cross-defendant Mutual Gold Corporation was represented by said William L. Grill, as its attorney, at which time, on his motion he was permitted by the Court to withdraw as such attorney and said David E. Hinckle was substituted for him. Defendant and cross-complainant Chandis Securities Company, a corporation, appeared by its attorney Richard G. Adams, Esq.

Both oral and documentary evidence were introduced by the respective parties. Thereafter the

cause was orally argued for the plaintiffs to the Court, and was briefed by the parties. On September 12, 1941, defendants and cross-defendants stipulated in writing with cross-complainant, by and through their respective attorneys, that the cross-complaint filed herein be dismissed without prejudice.

The Court, being fully advised in the premises, and having heretofore signed and filed its findings of fact and conclusions of law, now renders its judgment in accordance therewith.

It is hereby ordered, adjudged, and decreed

1. That plaintiffs take nothing by their action, and that defendants have and recover from the plaintiffs said defendants' costs including daily Reporter's fees and disbursements in said action in the sum of $88.63.

2. That the cross-complaint filed herein be dismissed without prejudice and without costs to either cross-defendants or [208] cross-complainant.

Dated this 30th day of Oct., 1941.

BEN HARRISON
Judge

Judgment entered Oct. 30, 1941.
Docketed Oct. 30, 1941.
Book C.O. #7 Page 229.

R. S. ZIMMERMAN,
Clerk,
By MURRAY E. WIRE,
Deputy.

[Endorsed]: Filed Oct. 30, 1941. [209]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Helen M. Sutherland, Charles W. Sutherland, M. I. Higgens, Maybelle Higgens and Helen Maude Lorenz, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from paragraph 1 of the final judgment entered in this action on October 30, 1941, which is in the following words and figures, to wit:

"It is hereby ordered, adjudged and decreed:

"1. That plaintiffs take nothing by their action and the defendants have and recover from the plaintiffs said defendants' costs including daily Reporter's fees and disbursements in said action in the sum of $88.63."

Dated this 26th day of January, 1942.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON
By FREDERICK D. ANDERSON
Attorneys for Plaintiffs
Address: 650 Subway Terminal Bldg.
Los Angeles, California.
Telephone: MIchigan 0804

[Endorsed]: Copies mailed to David E. Hinckle and Richard G. Adams, Attys. for Defts.

[Endorsed]: Filed Jan. 26, 1942. R. S. Zimmerman, Clerk. By E. L. S., Deputy. [211]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT [1 (39)]

PLAINTIFFS' EXHIBIT 1

ARTICLES OF INCORPORATION OF MUTUAL GOLD CORPORATION

Know all men by these presents, that we, the undersigned, Ben L. Collins and Harley Little, citizens of the United States and citizens and residents of the State of Washington, and Russell F. Collins, citizen of the United States and resident of the State of Idaho, have this day voluntarily associated ourselves together for the purpose of incorporating under the Laws of the State of Washington and do hereby certify in triplicate as follows:

Article I.

The name of this corporation shall be Mutual Gold Corporation.

Article II.

The objects and purposes for which this corporation is organized are as follows:

a. To search, prospect and explore for ores and minerals of all kinds, to locate mining claims, grounds and lodes in the United States of America and the territories thereof, and in Foreign Countries, and to record the same pursuant to the mining laws of the District and Country of their location; to work and develop mining claims, grounds and lodes; to crush, concentrate, smelt, refine, dress,

amalgamate and prepare for market ores, metals and mineral substances of all kinds, and to construct and maintain power houses, mills, and concentrating reduction and refining plants and buildings of every kind and nature, and to install therein, or in connection therewith, such machinery and appliances as may be necessary or convenient for carrying out the objects and purposes of the corporation.

b. To acquire by purchase or exchange, or in any other manner, in the United States or in Foreign Countries, mining claims, grounds or lodes, mining and mineral rights, concessions or grants, or any interest therein, and to sell, exchange, lease or in any other manner to dispose of the whole or any part thereof or any interest therein when desirable.

c. To acquire by location, purchase, exchange or in any other manner water and water rights, reservoirs, acqueducts, mill sites, power sites, and rights of way which may be necessary or convenient in the development and operation of its mining properties, or for other uses in connection therewith.

d. To buy, sell, and otherwise deal in ores, metals, plants, machinery, tools, implements, groceries, provisions, clothing, boots and shoes, hardware, wooden and metalic ware, and all other articles and things in anywise required or capable of being used in connection with mining operations, and to manufacture all such articles when required.

e. To acquire, construct, carry out, maintain, improve, equip, manage, control, or superintend any roads, ways, private railways, private tramways, bridges, reservoirs, acqueducts, pipe lines, power plants, hydraulic works, factories, warehouses and dwelling houses that may be required for the uses and purposes of the corporation.

f. To acquire, own, hold, buy, sell and in every other manner deal in the shares of stock of other corporations, and to exchange shares of its own capital stock for any of the things, rights or properties which it might otherwise lawfully acquire and hold as enumerated in this article.

f. To borrow money for the purpose of acquiring, improving, developing, operating and maintaining its mining properties, and for all other lawful purposes in connection therewith, including the payment of debts and expenses, and to issue therefor its notes, bonds or other obligations in writing, and to secure the same by mortgage or deeds of trust upon all or any part of its personal property and real estate and the appurtenances thereto.

Article III.

The amount of capital stock of said corporation is $50,000.00 divided into five million shares of the par value of one cent per share.

Article IV.

The corporation shall be managed by a Board of three Directors which number may be increased

to seven at any regular stockholders' meeting or special stockholders' meeting called for that purpose; the names and addresses of the trustees who shall manage said corporation until July 18th, 1932, are as follows:

Ben L. Collins	Spokane, Wash.
Harley Little	Spokane, Wash.
Russell F. Collins	Wallace, Idaho

Article V.

The term of existence of said corporation shall be fifty years.

Article VI.

The principal place of business of said corporation shall be the City of Spokane, Washington, but meetings of the Board of Directors may be held at such other places within or without the State of Washington as may be provided in the By-laws or by resolution of the Board of Directors.

In witness whereof, we have hereunto set our hands this 11th day of May, 1932.

(Signed) BEN L. COLLINS
(Signed) HARLEY LITTLE
(Signed) RUSSELL F. COLLINS

State of Washington,
County of Spokane—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby cer-

tify that on this 11th day of May, 1932, personally appeared before me Ben L. Collins and Harley Little, to me known to be the individuals described in and who executed the within instrument, and acknowledged that they signed and sealed the same as their free and voluntary act and deed, for the uses and purposes herein mentioned.

Given under my hand and official seal the day and year last above written.

(Notarial Seal)

(Signed) E. D. WELLER

Notary Public in and for the State of Washington, residing at Spokane.

State of Washington,
County of King—ss.

I, the undersigned, a Notary Public in and for the above named County and State, do hereby certify that on this 11th day of May, 1932, personally appeared before me Russell F. Collins, to me known to be the individual described in and who executed the within instrument, and acknowledged that he signed and sealed the same as his free and voluntary act and deed, for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year last above written.

(Notarial Seal)

(Signed) OTIS B. HARLAN

Notary Public in and for the State of Washington, residing at Seattle.

ARTICLES OF AMENDMENT
OF
MUTUAL GOLD CORPORATION

At a special meeting of the stockholders of Mutual Gold Corporation, called for that purpose, held at the office of the company in Spokane, Washington on June 18th, 1934, there being represented at said meeting 3,285,612 shares of stock, either in person or by proxy, out of 4,562,935 shares outstanding. It was unanimously voted to amend the articles of incorporation to increase the authorized capital of said corporation as follows:

That Article III of said articles of incorporation, reading as follows, to-wit:

"Article III"

"The amount of capital stock of said corporation is $50,000.00 divided into five million shares of the par value of one cent per share."

be and the same is hereby amended to read as

Article III.

The amount of capital stock of said corporation is $70,000.00 divided into seven million shares of the par value of one cent per share.

Dated at Spokane, Washington, June 20th, 1934.

MUTUAL GOLD CORPORATION

(Signed) R. P. WOODWORTH
Vice-President.

Attest:

BEN. L. COLLINS
Secretary

State of Washington,
County of Spokane—ss.

R. P. Woodworth and Ben L. Collins, being each first duly sworn, says: That they are respectively Vice President and Secretary of Mutual Gold Corporation; that the foregoing is a true and correct report of the special meeting of stockholders of said corporation called for the purpose of amending the articles of incorporation to increase the authorized capital of said company.

(Signed) R. P. WOODWORTH
(Signed) BEN L. COLLINS

Subscribed and sworn to before me this 20th day of June, 1934.

(Signed) E. D. WELLER
Notary Public for Washington Residing at Spokane

CERTIFICATE OF AMENDMENT OF ARTICLES OF INCORPORATION OF THE MUTUAL GOLD CORPORATION

At a regular annual meeting of the stockholders of Mutual Gold Corporation, held in Spokane, Washington on February 5th, 1936, notice thereof being regularly given, which notice specified the purpose of amending the articles of incorporation relating to the capital of said corporation, the following resolution was regularly offered and seconded:

> Resolved, that Articles III of the Articles of Incorporation of Mutual Gold Corporation be amended to read as follows:

"Article III.

"The amount of the capital stock of said corporation is $157,500.00 as follows:

"a. $132,500.00 divided into 2,650,000 shares of common stock of the par value of 5¢ per share.

"b. $25,000.00 divided into 100,000 shares of Class A common stock of the par value of 25¢ per share, which shall have equal voting rights with the other common stock and shall receive a preference dividend of 25¢ per share before any dividend shall be declared upon the other common stock and after such preference dividend shall have been fully paid, the shares of both classes of stock shall be equal in all respects."

Upon said resolution being put to a vote, out of a total of 6,315,171 shares outstanding 4,276,589 shares, present in person and by proxy, voted in favor of said resolution and 196,023 shares, present in person or by proxy, voted against said resolution.

It appearing that more than two-thirds of the outstanding stock voted for said resolution, Article III of said Articles of Incorporation was declared amended in accordance with the resolution.

Thereupon, it was moved, seconded and unanimously carried by vote of 4,472,612 shares that the outstanding common stock of the corporation be

exchanged for the new common stock on the basis of three shares of the outstanding common stock for one share of the new common stock.

(Signed) R. P. WOODWORTH
Vice President
(Signed) J. F. HALL
Secretary

State of Washington,
County of Spokane—ss.

R. P. Woodworth, as Vice-president and J. F. Hall, as Secretary of Mutual Gold Corporation, being each duly sworn on oath depose and say: That the foregoing certificate is a true and correct copy of the proceedings of the annual meeting of the stockholders of Mutual Gold Corporation relating to the amendment of Articles of Incorporation, increasing the capital of said corporation and reducing the number of shares and providing for the basis of reduction of said shares.

(Signed) R. P. WOODWORTH
(Signed) J. F. HALL

Subscribed and sworn to before me this 8th day of February, 1936.

(Signed) E. D. WELLER
Notary Public in and for the State of Washington, residing at Spokane.

BY-LAWS OF THE MUTUAL GOLD CORPORATION

Article I—Stockholders

Sec. 1. The annual meeting of the stockholders of this Company for the election of Directors shall be held at the office of the Company in the City of Spokane, Spokane County, Washington, on the first Monday in June of each year if said day is not a legal holiday, but if a legal holiday then on the day following.

Sec. 2. Special meetings of the stockholders may be called to be held at the office of the Company at its principal place of business, at any time by the President, or by a majority of the Board of Directors. It shall be the duty of the President to call a special meeting upon the written request of the holders of two-fifths of the stock of the corporation.

Sec. 3. In addition to the notice required by law, notice of meetings written or printed for every regular or special meeting of the stockholders, shall be signed by the President or Secretary and mailed by the Secretary of the Company to the last known address of each stockholder as shown by the books of the Company, not less than ten days before such meeting, and if for a special meeting, such notice shall state the object or objects thereof, and no other business shall be transacted at such special meeting.

Sec. 4. A quorum at any meeting of the stockholders, which consists of a majority of stock issued, represented either in person or by proxy. A majority of such quorum shall decide any question that may come before the meeting. Every person acting therein in person or by proxy or by representative, must be a bona fide stockholder, having stock in his own name on the stock books of the corporation, at least ten days prior to such meeting.

Sec. 5. Any stockholder may vote his stock by proxy in writing, given to any other stockholder of the Company. No person shall vote as a proxy unless he is a stockholder authorized to act in said meeting, and shall present to and file with the Secretary, written authority so to do, signed by the stockholder whom he represents.

Sec. 6. At such annual meeting of the stockholders of the Company for the election of Directors three Directors shall be elected from among the holders of stock, unless the number of Directors shall have been changed to seven, in which case seven shall be so elected, who shall serve for one year and until their successors are elected, and qualified. At least one of which Directors must be a citizen and actual bona fide resident within the State of Washington. All elections of Directors must be by ballot and the vote of the stockholders representing a majority of the issued capital stock shall be necessary to a choice. If for any reason Directors are not elected at the annual meeting of

the stockholders, a special meeting shall be called for that purpose within thirty days thereafter, at which time Directors shall be elected in all respects as at the annual meeting. At all elections for Directors each stockholder of record shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are Directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of Directors multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit.

Sec. 7. The order of business at the annual meetings, and as far as possible at all other meetings of the stockholders shall be:

1. Roll call
2. Proof of due notice of meeting
3. Reading and disposal of any unapproved minutes
4. Reports of officers and committees
5. Election of Directors
6. Unfinished business
7. New business
8. Adjournment.

Article II—Directors

Sec. 1. The corporate powers, business and property of this corporation shall be exercised, conducted and controlled by a Board of Three Directors, unless said number shall be subsequently

changed to seven, who shall be stockholders of the Company. All vacancies in the Board of Directors shall be filled by the remaining membership of the Board for the unexpired term or terms. Directors shall receive no compensation for their services as Directors, but they shall be allowed their reasonable traveling expenses for attending meetings of the Board.

Sec. 2. The regular meetings of the Board of Directors shall be held at the office of the Company at Spokane, Spokane County, Washington, on the first Monday of each month, if not a legal holiday then on the next succeeding day, and may be held at any other time or place within or without the State of Washington, when so designated by a resolution adopted before the adjournment of any regular meeting or when all the Directors are present, or agree in writing to hold such meeting at any other time or place.

Sec. 3. Special meetings of the Board of Directors shall be held at the principal office of the Company, or may be held at any time and place within or without the state without notice and for the transaction of any business, by unanimous written consent of all the Directors, or by the presence of all the Directors at such meetings. Special meetings of the Board of Directors to be held at the principal office of the Company may be called at any time by the President or by any two members of the Board of Directors.

Sec. 4. Notice of special meetings of the Board of Directors shall be delivered personally by the Secretary to each member of the Board, or such notice may be mailed by the Secretary to each member, not later than one day before such special meeting, and such notice shall state the purposes thereof, and no other business shall be transacted at such special meeting unless by unanimous consent of all the Directors in writing. Notices of regular and adjourned meetings of the Directors shall not be required.

Sec. 5. A quorum at any meeting of the Board of Directors shall consist of a majority of the entire membership of the Board, and a majority of such quorum shall decide any question that may come before the meeting. In the absence of a majority of the Board of Directors, those present may adjourn the meeting from day to day.

Sec. 6. Officers of the Company shall be elected by the Board of Directors at their first meeting after the annual election of Directors for each year. If any office shall become vacant during the year, the Board of Directors shall fill the same for the unexpired term. The Board of Directors shall fix the compensation of all officers of the Company.

Sec. 7. The Board of Directors may at any time by a two-thirds vote of the full membership of the Board, for good causes shown, remove any officer or other employee of the Company.

Sec. 8. The order of business at the meetings of the Board of Directors shall be as follows:

1. Roll Call
2. Proof of due notice of meeting (when notice is required)
3. Reading and disposal of any unapproved minutes
4. Reports of officers and committees
5. Unfinished business
6. New business
7. Adjournment.

Article III—Officers

Sec. 1. The officers of the Company shall be a President, one or more Vice Presidents, who shall be elected from among the Directors, and a Secretary and Treasurer and an attorney who shall be elected from among the Directors or stockholders, all of whom shall be elected for one year, and shall hold office until their successors are elected and qualified, unless removed sooner from office as hereinbefore provided. The office of Secretary and Treasurer may be united in one person.

Sec. 2. The President shall preside at all meetings of the stockholders and directors; shall have general management and supervision of the affairs of the Company; he shall sign as President all certificates of stock, and all contracts and other instruments in writing, which have been first approved and authorized by the Board of Directors;

he shall call the Directors together whenever he deems it necessary, make reports to the Directors and stockholders, and perform such other duties as are incident to his office, or are properly required of him by the Board of Directors. His acts at all times and in all matters shall be under the direction of the Board of Directors. He shall receive such salary, if any, as the Board of Directors may from time to time fix and allow.

Sec. 3. In the absence of the President, or in case of his inability to perform his duties, the Vice President shall exercise all the functions of the office.

Sec. 4. It shall be the duty of the Secretary to keep full and accurate minutes of the proceedings of the Board of Directors and of the stockholders, in a proper book, and to issue all necessary notices for such meetings. He shall keep a book of blank certificates of stock, fill out and countersign all certificates issued, and make the corresponding entries on the margin of each book on such issuance. He shall make transfers of stock upon the books of the Company, upon surrender of the original certificate, and shall keep a proper transfer book and stock ledger in debit and credit form, showing the number of shares issued to and transferred by any stockholder, and the dates of such issuance and transfer. He shall keep proper account books of all transactions of the Company and discharge such other duties as pertain to his office,

or which are prescribed by the Board of Directors. He shall be entitled to charge and collect the sum of Fifty Cents (.50) for each certificate issued in making transfers of stock on the books of the Company, (except original issue), to be paid by the party having the transfer made, and shall receive such additional compensation for his services as the Board of Directors may from time to time fix and allow.

Sec. 5. The Treasurer shall have the custody of all moneys and securities of the Company, and shall keep regular books of account and balance the same each month. He shall deposit the same in the name of the Company in such bank or trust Company as the Directors shall from time to time designate, and shall pay out the same by check only in payment of bills or debts of the Company which have first been audited and directed to be paid by the Board of Directors. He shall make a report in detail of all moneys received, from whom, when, and for what purpose, to the Board of Directors at least quarterly, and make such other reports and statements as the Board of Directors may require. He shall take itemized, receipted vouchers for all money paid out, and file the same with the Secretary with his report. He may be required to give a surety bond in such sums as the Board of Directors shall fix, the premium thereto to be paid by the Company. He shall sign or countersign such instruments as require his signature,

and shall perform all duties incident to his office, or that are properly required of him by the Board of Directors. He shall receive such compensation for his services as the Board of Directors may from time to time fix and allow.

Sec. 6. The attorney shall be the legal advisor of the Directors and stockholders, shall have charge of any and all legal business in which the Company may be interested and shall receive such compensation from time to time as the Directors may fix and allow.

Article IV.

Stock, Stock Books and Stock Certificates

Sec. 1. Certificates of stock in such form as the Directors may prescribe shall be issued when fully paid up, in numerical order from the stock certificate books, signed by the President and Secretary, and sealed with the corporate seal. A record of each certificate issued shall be kept on the stub thereof.

Sec. 2. Shares of stock may be transferred at any time by the holders thereof, or by attorney legally constituted or by legal representative, upon the delivery of the original certificate properly endorsed or transferred but no transfer shall be valid except between the parties thereto until the same is entered in proper form on the books of the Company, and no such entry shall be made until the surrender of the certificate of stock. The surrendered certificate shall be cancelled before a new certificate shall be issued in lieu thereof, and the

cancelled certificate shall be retained by the Secretary. No transfer of stock shall be made upon the books of the Company until all indebtedness to the Company from the person in whose name the stock stands, whether for assessment, calls or otherwise, is paid.

Sec. 3. All stock of the Company remaining unissued, or that may be donated to or otherwise acquired by the Company, shall be treasury stock, and shall be held subject to disposal by the Board of Directors. Such stock shall neither vote nor participate in dividends while held in the treasury of the Company.

Sec. 4. The board of Directors may require a bond in such sum as it may deem reasonable to protect the Company from loss, before ordering the issuance of a duplicate certificate of stock claimed to have been lost or destroyed by any stockholders.

Sec. 5. The stock books of the Company shall be closed ten days previous to any regular or special meeting of the stockholders, and also ten days previous to the payment of any dividend, and the list of stockholders as appears upon the books of the Company at the time of closing said books shall determine who shall vote said stock at such meetings or receive dividends thereon.

Article V—Seal

Sec. 1. The corporate seal of the Company shall consist of the words "Mutual Gold Corporation,

Incorporated, Seal 1932", and such seal as impressed on the margin hereof is hereby adopted as the corporate seal of the Company.

Sec. 2. The Secretary shall have the custody of the corporate seal and shall affix the same to all certificates of stock and other instruments of the Company requiring a seal when so directed by the Board of Directors.

Article VI.

The Directors of the Company may appoint an Advisory Committee of from three (3) to Fifteen (15) members, any member of whom may be called in at any time by the Directors to confer with the Board on any matter in which the Company may be interested. The advisory committee shall be chosen from among the stockholders of the Company, other than the Directors; each member of the Advisory Committee shall hold such office from the date of his appointment until the next annual meeting of the stockholders.

Article VII.

Sec. 1. These By-Laws may be amended, repealed or altered in whole or in part, or new By-laws may be adopted at the annual meeting of the stockholders, or at any special meeting of the stockholders called for that purpose, by a vote representing two-thirds of the outstanding stock, or by written consent of the holders of two-thirds of the out-

standing capital stock, given in the manner required by law.

Sec. 2. The Board of Directors may adopt additional By-Laws in harmony herewith, but shall not alter or repeal any by-laws adopted by the stockholders of the Company.

The foregoing By-Laws consisting of seven (7) articles were duly approved and adopted this 26th day of May, 1932.

RUSSELL F. COLLINS
President

BEN L. COLLINS
Secretary

PLAINTIFFS' EXHIBIT 2

is set forth in the Complaint, as Exhibit 1 thereto, at page 23.

PLAINTIFFS' EXHIBIT 3

is set forth in the Complaint, as Exhibit 2 thereto, at page 38.

PLAINTIFFS' EXHIBIT 4

is set forth in the Complaint, as Exhibit 4 thereto, at page 45.

PLAINTIFFS' EXHIBIT 5

MINUTES OF MEETING OF DIRECTORS OF MUTUAL GOLD CORPORATION

Held

July 18th, 1938

The Board of Directors of the Mutual Gold Corporation met at the office of the company at the Vance Hotel, Seattle, Washington, on Monday the 18th day of July, A. D., 1938 at the hour of 2:00 o'clock P. M. pursuant to adjournment and pursuant to notice sent to all the Directors and pursuant to call and waiver of notice duly signed by the members of the Board.

The meeting was called to order by President J. E. Stiegler, who presided, Vice President R. P. Woodworth acting as Secretary.

Roll call showed the following results:

Present—J. E. Stiegler, R. P. Woodworth, F. T. Hickcox, W. L. Grill, J. A. Vance, Russell F. Collins.

Absent—G. H. Ferbert.

Lloyd Vance and Robt. J. Cole were also present.

Call and Waiver of Notice was ordered spread upon the minutes and was as follows:

"WAIVER OF NOTICE
of
DIRECTORS' MEETING

We, the undersigned, being all the directors of the Mutual Gold Corporation, do hereby

call a meeting of the Board of Directors to be held at the Vance Hotel, Seattle, Washington, on Monday the 18th day of July, A. D., 1938 at the hour of 2:00 o'clock P. M.

We do hereby waive notice of the time, place and purpose of the said meeting, and do hereby consent that any and all business in any way pertaining to the affairs of the company may be transacted thereat.

R. P. WOODWORTH
J. E. STIEGLER
RUSSELL F. COLLINS
W. L. GRILL
F. T. HICKOCK
J. A. VANCE"

The president stated that the meeting had been called for the purpose of providing some way for the financing of the corporation and the further development and operation of its property and stated that the proposition that had been made by the Board of Directors to the Sunshine Mining Company had been rejected.

After some considerable discussion in regard to the matter, Lloyd Vance made a verbal offer to provide a corporation to take over and manage the property of the Mutual Gold Corporation, and after some discussion, Mr. Vance was requested to submit the proposition to the Board in writing and the meeting was adjourned to reconvene at the

same place at 7:30 P.M. to enable Mr. Vance to prepare and submit a written offer as outlined.

The meeting reconvened at 7:30 P.M., Monday the 18th day of July, A. D., 1938 pursuant to adjournment. The same officers presided and roll call showed the same persons present as above set forth.

Mr. Lloyd Vance submitted a written proposition to the Board of Directors which was ordered spread upon the minutes and is as follows:

"Seattle, Washington
July 18th, 1938

"To The Board of Directors of the Mutual Gold Corporation:

Gentlemen:

I herewith submit the following proposition with respect to your holdings and property situated in Mono County, California:

I and my associates will form a corporation under the laws of the State of Washington with a capital stock equal to the present outstanding capital stock of your corporation, the new corporation to have a par value of 25¢. Your corporation is to assign to me and the new corporation, an undivided one-half interest in your contract for purchase of said property and a good and sufficient mining deed to an undivided one-half interest in and to all of your other claims and holdings and turn

over to us the exclusive management and control of the property. We are to agree to install, as soon as weather conditions will permit, an amalgamation and cyanide plant capable of handling at least one hundred tons per day and will also install a hoist and other necessary mining equipment and buildings and furnish sufficient funds for working capital. We will also take care of the payments due and to become due on your purchase contract for the said claims and in return therefore we are to have all of the income from the said property until such time as all funds which we have advanced in the installation of machinery and equipment; payments on contract and for whatever purpose in connection with the operation of said property, after which time the net operating profits from the operation of said property shall be paid to you until your funded debt has been paid off and your preferred stock has received its preferred dividend at which time we are to own an undivided one-half interest in and to the property and assets of your corporation and in and to the assets of the new corporation. In other words, after the re-payment to us of the funds which we have advanced, and the re-payment to you of your funded debt, and 25¢ per share on your preferred stock, each corporation shall be entitled to and shall receive one-half of the net operating profits.

If this proposition meets with your approval, a detailed contract is to be worked out, you are to forthwith call a meeting of your stockholders and have them ratify the same and extend to the stockholders of your corporation the right to purchase stock in the new corporation on the same proportionate basis as they now hold stock in the Mutual Gold Corporation. To take care of the present indebtedness for loans to your corporation, you will increase your capital stock so that this $24,000 of indebtedness, (or whatever the amount may be), will be taken care of on a stock bonus and note basis, the same as was provided when you raised your last $30,000, or if you prefer, we will take care of these loans to your corporation, in which event the new corporation shall receive 60% interest in the property and you will receive 40% interest upon the completion of the terms herewith outlined, or in other words the profits at that shall be divided 60% to the new corporation and 40% to your corporation.

We will, of course, agree to take care of the assessment work which may be necessary to protect your claims as required by law, or in the event that we should decide we do not wish to hold any of the said claims, we will notify you in sufficient time so that you can do the assessment work thereon on the present machinery and equipment which you now have.

We, of course, will be allowed to sell or dispose of in such manner as we see fit and will make proper accounting to your corporation therefor. However, we shall have the right to use and have the exclusive management and control of all of the property of your corporation.

This offer is made contingent upon our examination of the titles and claims now held under lease and option for which we are to have a period of fifteen days from the date hereof to examine and if not satisfactory this offer may be withdrawn.

Respectfully submitted,"

Objections were raised as to the proposition submitted as follows:

1. That the current obligations and capital stock tax of the Mutual Gold Corporation should be taken care of by the new company.

2. That the new company should take over the recent loans of Mr. J. A. Vance and Mr. J. E. Stiegler to the Mutual Gold Corporation, and that the same should be a part of the new corporation with right to such new corporation to reimburse itself for expenditures in this respect the same as any other expenditures.

3. That after the new company had been repaid from the net operating profits all funds which it had advanced for Mutual Gold Corporation, loans assumed, expenses incurred, etc., that the net oper-

ating profits would then be paid over to the Mutual Gold Corporation until such time as is funded debt had been paid off and its Class A stock had received dividends of 25¢ per share from and after which time the net operating profit would be divided on a 50-50 basis.

4. That Lloyd Vance should guarantee a subscription to the new corporation, exclusive of the loans assumed by it, in the amount of $70,000.

After some considerable discussion Mr. Lloyd Vance agreed to accept the changes recommended in the said offer and the Secretary was instructed to let the minutes so show.

Thereupon, on motion made by Mr. Grill, seconded by Mr. Hickcox and unanimously carried, the following resolution was adopted:

Resolved that the offer of Lloyd Vance as submitted to this meeting, (copy of which is spread upon the minutes) when changed and altered in conformity with the changes hereinbefore set out in these minutes, be and the same is hereby received, approved and recommended to the stockholders for acceptance; that the annual meeting of the stockholders be called and held as soon as possible and not later than the 6th day of August, A. D. 1938 at the hour of 11:00 o'clock A.M. for the purpose of electing a Board of Directors and approving and acting upon the offer of the said Lloyd Vance for the sale and disposition of the undivided one-half interest in and to the holdings of the company, and author-

izing and empowering the Board of Directors to sell or otherwise dispose of the whole or any part of the assets of the corporation at such time or times and on such terms and conditions as they may deem adequate, and to form and enter into any working agreement along the lines as contemplated by the offer of said Lloyd Vance, or such other or different agreement as they may, in their absolute descretion deem advisable, and to transact any and all other business that may come before said meeting, and that the Secretary be and she is hereby authorized, empowered and instructed to set the date of such meeting at the earliest moment possible as provided by law and the by-laws of this corporation, and that a letter be sent with the notice of such meeting to all the stockholders advising them fully with respect to the necessity of some such action and covering the activities of the company since the last report to *teh*m made under date of April 5, 1938, such letter to be approved and signed by Mr. J. E. Stiegler as President; and that Wednesday, the 20th day of July A. D., 1938 at 12:00 o'clock noon be and the same is hereby fixed as a recorded date for the determination of the shareholders entitled to notice of such meeting.

On motion duly made, seconded and carried the Treasurer was instructed to pay to Russell F. Collins the sum of $100.00 as soon as funds were available.

On motion duly made, seconded and carried, the Secretary was instructed to ask for 60 days exten-

sion of time within which to file the Capital Stock Declaration for the reason and on the grounds that a deal was pending for the sale of the property of the company, which, if consu*m*ated would materially affect the declaration of value.

No further business appearing the meeting, on motion duly made, seconded and carried was adjourned to be reconvened at the office of the company, 401 Fernwell Building, in the City of Spokane, Washington on Saturday, the 6th day of August, 1938 at the hour of 9:30 A.M. or at such hour and place on the day fixed for the holding of the stockholders meeting as contemplated by these minutes.

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President

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Recording Officer

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Directors

PLAINTIFFS' EXHIBIT 6

NOTICE OF ANNUAL MEETIING OF STOCKHOLDERS

of

MUTUAL GOLD CORPORATION

Date of Meeting—August 6, 1938

Notice is hereby given that the Annual Meeting of Stockholders of the Mutual Gold Corporation will be held at the office of the Company, 401 Fernwell Building, in the City of Spokane, Washington, on Saturday, the 6th day of August, A. D. 1938, at the hour of 11:00 o'clock A. M., for the following purposes:

1. To elect a Board of Directors for the ensuing year.

2. To approve, ratify and confirm the acts and proceedings of the Board of Directors and Officers of the corporation since the last Annual Meeting of Stockholders.

3. To authorize, empower and direct the Board of Directors to accept the offer of Lloyd Vance as outlined in the letter of the President under date of July 20th, 1938, a copy of which letter is herewith enclosed, and by reference made a part hereof, and/or authorize, empower and direct the Board of Directors to make and enter into such other or different deal with Lloyd Vance, or any other person or corporation, with respect to all of the assets of this corporation, the management, control and oper-

ation thereof, the division of the profits thereof or otherwise, as such Board of Directors shall, in their absolute discretion, deem expedient, advisable or desirable.

4. To authorize and empower the Board of Directors to sell, lease, exchange or otherwise dispose of all of the assets of this corporation at such time or times, for such price and upon such terms and conditions, for cash or otherwise, as they shall, in their absolute discretion deem expedient, advisable or desirable, including the exchanging for shares in another corporation, domestic or foreign.

5. To take action upon and transact any other business which may properly and lawfully come before the meeting.

The Minute Book of the corporation will be presented to the meeting and will be open for the inspection of stockholders.

The enclosed form of proxy is solicited by the management and it is the intention of the proxies named therein to vote for the election of the Directors of the corporation for the ensuing year, and in favor of approving, ratifying and confirming the acts and proceedings of the Board of Directors and the Officers of the corporation since the last Annual Meeting of Stockholders of the corporation (held February 3, 1937) and as outlined above.

If you do not expect to be personally present at

the meeting the Board of Directors request that you sign and return the enclosed proxy at once.

Dated July 20, 1938.

MUTUAL GOLD CORPORATION
By E. FUSON, Secretary.

PLAINTIFFS' EXHIBIT 8

MUTUAL GOLD CORPORATION
401 Fernwell Building
Spokane, Wash.

Directors
J. A. Vance, Seattle, Wash.
Russell F. Collins, Leevining, Cal.
R. P. Woodworth, Spokane, Wash.
J. E. Stiegler, Naches, Wash.
W. L. Grill, Seattle, Wash.
F. T. Hickcox, Tacoma, Wash.
G. H. Ferbert, Naches, Wash.

Officers
J. E. Stiegler, President
R. P. Woodworth, Vice-President
J. A. Vance, Vice-President
Russell F. Collins, Vice-President
E. Fuson, Secy.-Treas.

July 20, 1938

Dear Stockholders:

By direction of the Board of Directors there is enclosed herewith notice of meeting of the stock-

holders of your Company to be held at the office of the Company at 401 Fernwell Building, in the City of Spokane, Washington, on Saturday, the 6th day of August, 1938, at the hour of 11:00 o'clock A. M.

If you will not be personally present at the said meeting, kindly sign and return, at once, the proxy which is enclosed herewith, that all stock may be represented at this meeting—this is imperative.

Since the reports mailed to you under date of April 5th, 1938, your officers and directors have been actively engaged in endeavoring to provide ways and means for the further financing and operation of your property. Mr. J. A. Vance, Vice-President and General Manager, recently spent about two weeks at the property with Mr. Robert J. Code, Mining Engineer, who, under date of June 14, 1938, made a very comprehensive report of his findings, with recommendations. Tests have also been made with respect to the proper treatment of this ore to effect a better saving than was possible with our present equipment.

The result of these reports seems to be that we have at least 125,000 tons of ore available that averages about $11.20 per ton. That savings by amalgamation, as shown by laboratory test, is about 50% while by actual operation we recovered about 64%. That approxomately 98½% may be recoverable by amalgamation and cyanidation.

While use of our present equipment was advisable during the development period for the purpose of determining the character and continuity of the ore, proper method of treatment, and to assist in providing funds to carry on the work, the condition of the property is now such that further operation with the present equipment should not be continued. A new amalgamation and cyanidation plant capable of handling at least 40,000 tons per year should be installed, electrical power line put in, new hoist equipment, mining machinery and additional accommodation for larger crew provided.

With this idea in view we have been contacting some of the larger well-known operating companies with a view of interesting them in taking over and operating your property under similar terms and conditions as the Azurite, Jack Waite and others have been handled. While we have not been successful in this respect our lack of success, we believe, was due to the present low market on base metals and the unsettled business conditions in general and not ao any lack of merit or interest in your property.

Time also is short, as it is necessary, if any additional equipment is to be installed this year, that it be installed at once. Another $10,000.00 payment is due this fall on the contract of purchase and a crew must be kept continuously employed at the property to keep the tunnels in working condition, which would require about $20,000 to be spent for

these items—funds for which would have to be raised outside.

The best offer which we have thus far received and which will be submitted to you, as stockholders, for your approval, was received from Lloyd Vance on the 18th instance, the substance of which, as agreed to, is as follows:

That Mr. Lloyd Vance, and his associates, will at once form a corporation under the laws of the State of Washington with a capital at least equal to the present outstanding capital of the Mutual Gold Corporation; the stock of the new corporation having a par value of 25 cents per share. That the stockholders of the Mutual Gold Corporation will be given an opportunity to purchase an interest in the new corporation equal to what their present holdings are in the Mutual Gold Corporation, that is, holders of 5 per cent par common stock, will be given an opportunity to purchase one 25 cent par share in the new corporation for each 5 shares of common they now hold and the present Class A 25 cent par stockholders, will be offered an opportunity to purchase one 25 cent par share in the new corporation for each Class A share they now hold.

Mr. Lloyd Vance and associates will underwrite $70,000.00 at least of stock in the new corporation as a guarantee that that amount will be immediately available for the carrying out of the terms of the contract.

The new corporation will agree to forthwith install an amalgamation and cyanidation plant capable of handling at least 100 tons per day, new hoist, power line, adequate mining equipment and tools, erect such additional buildings as may be necessary, take care of payments on the option and lease for the purchase of the property, provide funds for taking care of the current liabilities of the Mutual Gold Corporation and the present capital stock tax of the Mutual Gold Corporation, and will also take into the new corporation the $21,000.00 in debts consisting of loans made to the Mutual Gold Corporation over and above its last $30,000.00 funded debt.

The new corporation is to have the exclusive management and control of all of the property of the Mutual Gold Corporation and all of the net operating profits shall go to the new corporation until such time as any and all funds expended by it in the operation of the property, installing machinery, payment of loans, and any and all funds expended by it for whatever purpose shall have been paid, after which time all of the net operating profits shall go to the Mutual Gold Corporation until such time as its funded debt shall have been paid off and its Class A stock shall have received 25 cents per share, at and from which time the net operating profits shall be divided 50-50 between the Mutual Gold Corporation and the new corporation.

This, in substance, covers the principal points contained in the offer of Lloyd Vance, the details

of the contract of course, it will be necessary for your Board of Directors to work out.

You will be asked to approve the offer and authorize the Board to execute such contract as they shall deem advisable, and will also be requested to authorize them to sell or otherwise dispose of the whole or any part of the assets of the Mutual Gold Corporation at such time or times, and on such term or terms and conditions as they shall, in their absolute discretion, deem adequate so that they may be placed in a position to dispose of the whole or any part of the property, and have full authority to do so should they find it necessary or advisable.

Very truly yours,

J. E. STIEGLER,
President.

PLAINTIFFS' EXHIBIT 9

MINUTES OF ANNUAL MEETING OF STOCKHOLDERS

of

MUTUAL GOLD CORPORATION

Held August 6, 1938

The stockholders of the Mutual Gold Corporation met in regular annual session at the office of the company, 401 Fernwell Building in the City of Spokane, State of Washington, on Saturday the 6th day of August A. D., 1938 at the hour of 11:00 o'clock A.M., pursuant to call and notice.

The meeting was called to order by President J. E. Stiegler who asked R. P. Woodworth to preside, Secretary E. Fuson acting as recording officer.

The Chair appointed Mr. E. D. Weller and Mrs. E. Fuson as proxy committee to check and report on the proxies.

The office of the company being inadequate to accomodate the stockholders, the meeting, on motion duly made, seconded and carried was adjourned to be reconvened at the office of the Company in the Assembly Room of the Old National Bank Building, Spokane, Washington at the hour of 2:00 o'clock P.M.

The meeting reconvened at 2:00 o'clock P.M. at the office of the Company in the Assembly Room of the Old National Bank Building, Spokane, Washington pursuant to adjournment, the same officers being in the chair.

Roll call showed the following results:

Present in Person	856,404
Present by Proxy	1,105,953
Present by Endorsed Certificates	22,250
Total shares present and entitled to vote	1,984,609
Total shares outstanding	2,633,830
Shares necessary for a majority	1,316,916
Shares necessary for a ⅔ majority	1,755,890

The proxy committee reported that the proxies were in regular form in the amounts as above

stated, and upon motion duly made, seconded and carried, the report of the proxy committee was accepted and approved.

The Secretary presented a copy of the Notice of the Annual Meeting pursuant to which the meeting was held, and a copy of the letter of J. E. Stiegler, President referred to and made a part of said notice together with the affidavit of mailing to each and all stockholders of record more than 10 days prior to the date fixed for the meeting as provided by the by-laws of the company. The same being in regular form and there being no objections thereto, the Chair de*l*cared the meeting was regularly and duly called and open for business.

The minutes of the last meeting of the stockholders held February 3, 1937 were read and on motion duly made, seconded and carried, approved as read.

The reports of the officers and directors having been mailed to the stockholders together with a copy of the balance sheet, and there being no objection thereto, on motion duly made, seconded and carried, same were ordered accepted and approved.

The next order of business was the election of a Board of seven directors to serve until the next annual meeting of the stockholders and until the election and qualification of their successors.

The following were duly nominated:

J. E. Stiegler	F. T. Hickcox
W. L. Grill	R. F. Collins
J. A. Vance	G. H. Ferbert
R. P. Woodworth	

There being no further nominations, same on motion duly made, seconded and carried were declared closed. There being no contest for any of the offices of directors, on motion duly made, seconded and carried, the Secretary was instructed to cast the unanimous ballot of all shares present and entitled to vote for the said directors so nominated, and the Secretary thereupon cast 1,984,609 votes for the said directors and the Chair thereupon declared that J. E. Stiegler, W. L. Grill, J. A. Vance, F. T. Hickcox, R. F. Collins, G. H. Ferbert, and R. P. Woodworth were duly elected and so declared them to be, to serve until the next annual meeting of the stockholders and the election and qualification of their successors.

The chair then read the notice of the new business to be taken up at the meeting as contained in the notice of the meeting which was to authorize the Board of Directors to enter into some form of agreement with someone along the lines as contained in the offer which had been submitted to them by Lloyd J. Vance, to form a corporation to take over and manage the property, or to authorize the Board to enter into such other or different deal with Lloyd J. Vance or any other person or persons as they might see fit, and further to authorize the Board of Directors to sell or otherwise dispose of the property at such time or times and on such terms and conditions as they might see fit. Mr. Lloyd J. Vance then handed the Chair the following letter addressed

to the Board of Directors which was read to the stockholders:

"Seattle, Washington
August 6th, 1938
2:30 P.M.

Board of Directors
Mutual Gold Corporation
401 Fernwell Building,
Spokane, Wn.

Gentlemen:

Reference is hereby made to my offer submitted to you at the meeting of your Board held at the Vance Hotel, Seattle, Washington, on Monday, the 18th day of July A. D., 1938.

In view of the fact that this offer, as submitted by me, has not yet been accepted by you, and that the changes made in same at your meeting altered the written proposal as submitted, so that the terms thereof are somewhat different and in view of the fact that I was unable to secure an abstract on the Mutual Gold properties as there was no abstract office in Mono County, said offer is hereby withdrawn. Furthermore, it is my understanding that two of the directors have another proposition which they favor.

LLOYD J. VANCE"

Mr. Russell F. Collins then asked Mr. Ferbert to present his proposition. Mr. Ferbert then read a

telegram from Mr. Keily addressed to Russell F. Collins which stated in substance (said telegram not being filed with the Secretary) that Mr. Keily was unable to answer the questions which had been asked in a telegram to him by Mr. Collins, and that he could not make any definite commitments as to what anyone would do, but he felt sure that Mr. Garbutt would enter into a contract satisfactory to the Board.

Mr. Ferbert then ask Mr. Collins to explain the matter further advising the stockholders as to what the contents of his telegram to Mr. Keily had been. Mr. Collins advised that he had wired Mr. Keily to advise him as to whether or not Mr. Garbutt was willing to go ahead with the same kind of a deal that had been submitted by Mr. Vance and whether or not he would let the stockholders of the corporation set in in the same manner which Mr. Vance had offered to do.

He then went ahead to explain that after Mr. Vance's offer had been received by the Board, Mr. Garbutt had been contacted to see whether or not he would make a deal the same as Mr. Lloyd Vance had offered, and that Mr. Garbutt stated that he would take Mr. Vance's vehicle and pledge $86,-000.00 of his own money if the deal were turned over to him, and that he would guarantee that there would be no forfeiture of the contract or any trouble in that respect if he had the deal. Mr. Col-

lins then explained that Mr. Garbutt was a man of his word and that he would personally guarantee that anything Mr. Garbutt had said he would stand back of, and that Mr. Garbutt was the agent for the owners and that Mr. Keily, who had sent the telegram, was the mining superintendent who had been on the property for the company and as agent for the owners, and that if a deal was entered into with Mr. Garbutt, naturally there would be no trouble with regard to the contract of purchase.

The Chair then asked Mr. E. D. Weller to preside, and after attaining the floor, explained that the so called offer which Mr. Ferbert and Mr. Collins were attempting to make was mere hearsay and not a concrete proposition. He then read to the stockholders the offer which had been submitted by Mr. Lloyd J. Vance and requested that same be spread upon the minutes, and a copy thereof is hereto attached and made a part hereof.

Mr. Woodworth then went on to explain that the offer which he had just read was a concrete proposition, that no other definite offer had yet been received, that the telegram was vague, not signed by Mr. Garbutt and mere hearsay, and was an attempt to seal the offer which had been made by Mr. Lloyd Vance, which was not fair in that Mr. Vance, Sr. had saved the property for the company at two different times by the expenditure of his own money, and that it did not seem right to him to let an outsider take the same deal as presented

by Mr. Lloyd Vance, and he presented the following resolution and moved its adoption:

"Resolved, that the offer of Mr. Lloyd J. Vance, as outlined in the letter of the President of this corporation to the stockholders thereof, as more fully outlined at this meeting and set forth in the minutes thereof, be and the same is hereby approved, and that the Board of Directors of this corporation be, and they are hereby authorized, empowered and directed to accept said offer and to take any and all steps necessary or deemed necessary, and/or to enter into such other or different deal or agreement with Lloyd J. Vance or any other person or corporation with respect to the management, control and operation of all the assets of this corporation, the division of profits thereof or otherwise as the Board of Directors of this corporation shall, in their absolute discretion deem expedient, advisable or desirable."

Some discussion was had thereon without a second, whereupon Mr. Woodworth withdrew the resolution and offered the following resolution and moved its adoption:

"Resolved, that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, exchange or otherwise dispose of, to any person, persons or corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in

another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection, which in their judgment they may deem necessary or advisable." Which motion was seconded by Mr. Bateham.

Mr. Grill then offered the following resolution and moved its adoption:

"Resolved, that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, deal with, operate, exchange or otherwise dispose of, to any person, persons or corporation desiring to purchase, lease, deal with, exchange, operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection, which in their judgment they may deem necessary or advisable."

The resolution was duly seconded, ballot taken and 1,984,609 shares voted in favor thereof. The chair then declared same duly carried.

Mr. Woodworth then resumed the chair and called upon Mr. Cole, Mining Engineer who had recently examined the property, to address the stockholders. Mr. Cole thereupon explained to the stockholders

the result of his examination and findings and went into some detail in regard thereto.

No further business appearing, the meeting on motion duly made, seconded and carried was adjourned.

J. E. STIEGLER
Chairman

E. FUSON
Secretary

Seattle Washington
August 5th, 1938.

Board of Directors,
Mutual Gold Corporation,
401 Fernwell Building,
Spokane, Washington.

Gentlemen:

Reference is hereby made to my offer submitted to you at the meeting of your Board held at the Vance Hotel, Seattle, Washington, on Monday, the 18th day of July, A. D. 1938.

In view of the fact that this offer, as submitted by me, has not as yet been accepted by you, and that the changes made in same at your meeting altered the written proposal as submitted, so that the terms thereof are somewhat confusing, I am exercising the right specifically reserving therein and said offer is hereby withdrawn, and in lieu thereof I herewith submit the following proposition

with respect to your holdings and property situate in Mono County, California.

I will forthwith upon your acceptance of this offer and my proposition as herein contained, organize a corporation under the laws of the State of Washington, having a capital stock of $162,500.00, divided into 650,000 shares of common stock of the par value of 25 cents each. Such corporation shall be known as the Mono Lake Mining Company, or by such other name as I may decide upon. Such corporation so formed by me is to take over all of the mining property and equipment of your corporation and to operate the same under the proposed terms and agreement as set forth in the memorandum of agreement hereto attached and made a part hereof, and your acceptance of this offer will be an agreement by you to execute such agreement, forthwith upon the completion of the organization of such corporation.

It is understood that no personal liability of any kind, character or description shall rest upon me other than as to the forming of such corporation as herein contemplated and that any and all liability with respect to the carrying out of the terms of said contract shall be upon the corporation so formed, and not upon me.

Respectfully submitted,

LLOYD J. VANCE

Vance Lumber Company
Joseph Vance Building,
Seattle, Washington.

AGREEMENT

This Agreement made and entered into this ..... day of August, 1938, by and between the Mutual Gold Corporation, a corporation organized and existing under and by virtue of the laws of the State of Washington with its principal place of business at Spokane, Washington, and authorized to do business within the State of California, party of the first part, hereinafter called "Owner", and ...., a corporation organized and existing under and by virtue of the laws of the State of Washington, party of the second part, hereinafter called "Operating Company",

Witnesseth:

That whereas the party of the first part is now the owner and holder of that certain lease and agreement dated July 13, 1932, made and executed by the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, as Sellers, and Russell F. Collins and Ben Collins, as Buyers, for the sale and purchase of the following described mining claims situate in Mono County, California, in what has been known at various times as Mono Lake Mining District, Bridgeport Mining District, and Homer Mining District, to-wit: Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Mill Site, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro

and Burke Fraction; the Log Cabin No. 2, Log Cabin No. 6 and Log Cabin No. 7 being patented and the others unpatented lode mining claims; a copy of which agreement, marked "Exhibit A" is hereto attached and made a part hereof as fully and to all intents and purposes as tho set forth in full herein, and hereinafter referred to with all amendments and changes therein as "Purchase Contract", and

Whereas on or about the 13th day of July, A.D. 1932, supplemental agreement affecting the said contract was made and entered into by and between the said Chandis Securities Company, M. N. Clark and Alice Clark Ryan, and the Mutual Gold Corporation, a copy of which agreement marked "Exhibit B" is hereto attached and made a part hereof as fully and to all intents and purposes as tho set forth in full herein, and

Whereas other agreements changing and altering the said original agreement have been made and entered into, all of which agreements are familiar to the Operating Company, and all of which agreements are hereby referred to and made a part hereof as fully and to all intents and purposes as tho set forth in full herein, and

Whereas there is a balance due and unpaid on the said Purchase Contract in the amount of One Hundred and Thirty Thousand ($130,000.00) Dollars, and

Whereas the party of the first part is the owner

of the following unpatented lode mining claims situate in Homer Mining District, in the County of Mono, State of California, described as follows, to-wit: Timber Slope, Contact, Contact No. 1, Mutual Gold Lode, Mutual Gold Lode No. 1, Dome, Dome No. 1, and recorded in Volume 1, pages 223, 224 and 225, Mono County Records, title thereto being acquired by deed dated November 15, 1932, executed by John Simpson, Mary Stevens and Russell F. Collins and filed December 21, 1932, and recorded in Volume 7 of Official Records, page 201, records of Mono County, California (seven claims) and also

Lakeview, Lakeview No. 1, Lakeview No. 2, Lakeview No. 3, Gunsight, Gunsight No. 1, Gunsight No. 2 and Gunsight No. 3, title thereto being acquired by deed dated November 15, 1932, executed by John Simpson, Mary Stevens, Walter Stewart and Russell F. Collins and recorded in Volume 8 of Official Records, page 306, Records of Mono County, California (eight claims), and also

Summit Extension, Summit Extension No. 1, Summit Extension No. 2, Summit Extension No. 3, Summit Extension No. 4 and Summit Extension No. 5, title thereto being acquired on November 15, 1932, by deed executed by John Simpson, Mary Stevens, Walter Stewart and Russell F. Collins, said deed being recorded in Volume 8 of Official Records, page 305, Records of Mono County, California, (six claims). (Said fourteen claims last

described being also conveyed to owner by deed from same parties filed for record December 21, 1932, and recorded in Volume 7, Official Records, page 202, Mono County California) and

Whereas the Owner has certain milling equipment, mining equipment and machinery and tools situate upon the above described property, which milling equipment and machinery is inadequate and not practical for the further continued use and operation of its property, and

Whereas the owner has certain supplies situate upon the said property in the approximate amount of One Thousand ($1,000.00) Dollars, and

Whereas the owner has certain indebtedness due on open accounts, production certificates, production notes and current bills and does not have sufficient funds to carry on and continue its mining operation, and

Whereas the Owner desires to enlist for the purpose of further developing, equipping and operating the said mining property, the financial resources and mining skill of the Operating Company, and

Whereas the Operating Company is willing to utilize its resources and skill in connection with the said mining property;

Now, therefore, in consideration of the premises and the mutual benefits to be derived therefrom, the sum of Ten ($10.00) Dollars by each party to the other in hand paid, the receipt and sufficiency of

which is hereby acknowledged, the parties hereto hereby agree as follows:

1. The period of this agreement shall be perpetual, subject to the termination thereof by the expiration of the Charter of the Owner, and subject further to the termination thereof as hereinafter provided.

2. The Operating Company agrees to furnish a minimum of Seventy Thousand ($70,000.00) Dollars to be expended by it insofar as may be necessary in the construction of an amalgamation and cyanide plant on the property with a rated capacity of one hundred tons per twenty-four hours, installation of a hoist, power line, necessary mining equipment and buildings, and provide supplies and working capital to operate the mine.

3. The Operating Company agrees to assume the outstanding open accounts of the Owner in the amount of Twenty-one Thousand Five Hundred Seventy Eight Dollars and Fifty Cents ($21,578.50) by exchanging stock in the Operating Company at par with the creditors owning said accounts, but the Operating Company does not otherwise assume said accounts or obligate itself to pay the same.

4. The capital stock of the Operating Company shall be One Hundred Sixty-two Thousand Five Hundred ($162,500.00) Dollars and the number of shares into which it shall be divided is 650,000 common shares of the part value of twenty-five cents each. The present stockholders of the Owner shall

have the right to subscribe, within fifteen days from the date of this contract, to the stock of the Operating Company, in the ratio of one share in the Operating Company for each five shares of common stock held in the Owner, and one share of the stock of the Operating Company for each five shares of preferred stock held in the Owner. After the expiration of said fifteen day period the present stockholders shall have no further right to make any subscription thereto and the Operating Company shall have the right to sell or otherwise dispose of any and all of its stock not so subscribed at such time, or times, and on such terms and conditions, for cash or otherwise, as it shall see fit, provided, however, that none of said stock shall be disposed of at less than twenty-five cents per share.

5. The Operating Company agrees to advance the amount necessary to pay the installment of Ten Thousand ($10,000.00) Dollars, which by the contract of purchase, the Owner is obliged to pay on November 1, 1938, and to assume any and all liability of the Owner under the said "Purchase Contract" according to the terms and conditions thereof as contained in the said contract and any and all modifications or changes thereto, and to comply with all of the terms and conditions thereof, and to keep the same in good standing at all times.

6. The Operating Company agrees to advance the necessary funds to take care of the capital

stock tax of the Owner due and payable in the year 1938 and any and all current bills of the Owner now due.

7. The Operating Company further agrees to perform the assessment work required by law as to any of the unpatented mining claims hereinabove described, so as to fully protect the Owner at all times in that respect, provided, however, that the Operating Company may at any time relinquish its rights in and to any of the said unpatented mining claims which it does not deem advisable to develop further or longer hold, and may be relieved from all liability in regard thereto by executing a conveyance of its interest in the said mining claims to the Owner, and delivering same in sufficient time for it to perform any assessment work necessary to protect the said claims.

8. The Operating Company shall have, and is hereby given, the right to apply for and secure patent, in the name of the Owner, to any of the said above described mining claims and have the same surveyed; that any and all charges and expenses so paid by the Operating Company shall be repaid to it as a part of its operating expenses as herein provided.

9. The Owner covenants and agrees to assign, transfer and set over to the Operating Company, and by these presents does hereby assign, transfer and set over unto the Operating Company an undivided one-half interest in and to the contract

of purchase hereinbefore referred to, marked "Exhibit A" and hereto attached and made a part hereof, subject to the terms and conditions hereof, and does hereby agree to forthwith turn over the exclusive possession of all of said property and the exclusive management and control thereof unto the Operating Company, to be operated by it permanently except as herein otherwise provided, and the said Owner does hereby further agree as, if and when title shall be executed to it by or under the terms of the said "Purchase Contract" to forthwith execute to the Operating Company a good and sufficient deed transferring and setting over to the said Operating Company an undivided one-half interest in and to said mining claims; said Owner does further agree at such time to execute a good and sufficient deed to the other mining claims hereinabove described conveying, transferring and setting over to the said Operating Company an undivided one-half interest in and to the said mining claims, and to execute any and all instruments of transfer necessary, or deemed necessary, in order to convey, set over and transfer to the Operating Company an undivided one-half interest in and to the said mining claims and each and all of them, to the end that each of the parties hereto shall at such time own an undivided one-half interest in and to the said property.

10. The Operating Company shall promptly begin and prosecute vigorously the installation of the

new milling plant with related appurtenances and start operating subject to such delays as may be occasioned by *force majeure.*

11. The Operating Company shall mine and mill and operate the property in accord with good mining practice and in such manner as, in the opinion of the Operating Company, will be in the best interests of all concerned and upon such tonnage scale as the ores available in said properties, in the opinion of the Operating Company, justify, and in accord with good mining practice, and subject further to such production limitations as may be imposed by any authorized governmental agency, provided, however, that such operation shall at all times be in accord with and as provided and set forth in the said "Purchase Contract" and any and all amendments thereto.

12. The net profits shall be determined, by deducting the total expenses of whatsoever nature in connection with the operation of the properties including all costs of management, administration and operation, from the net proceeds from crude ores and/or concentrates or mint returns or other products from the property, and same shall be divided as follows:

(a) The payments on the contract of purchase shall be met first as they become due and payable.

(b) After sufficient working capital has been accumulated the net profits shall thereafter be

credited against the expenditures made by the Operating Company under the terms hereof or in connection herewith until such time as any and all of said expenditures and advances shall have been repaid to the said Operating Company.

(c) Thereafter the net profit shall be distributed, first, to the payment of the production certificates and production notes of the Owner now outstanding and amounting to Thirty One Thousand Eight Hundred and Seven ($31,807.00) Dollars, and second, to the retirement of its preferred stock then outstanding.

(d) After the retirement of the above obligations in the order as enumerated, the net profit shall be distributed fifty percent to the Owner and fifty percent to the Operating Company. The net profits shall be distributed semi-annually, quarterly or monthly, at the option of the Operating Company.

13. At all reasonable times an accredited representative of the Owner shall have full and free access to the said properties, to the plants handling the ores and to the metallurgical and financial records pertaining thereto so as to be currently informed and assured as to the correctness of the accounts which the Operating Company shall render, as soon as conveniently possible after the termination of each six months period (or quarterly if the Operating Company so desires) and the Owner shall have thirty days from the date of mail-

ing said accounts within which to examine the same and object thereto in writing, if any error is found therein, it being understood and agreed that failing such objection within said period the accounts shall be considered correct.

14. The Operating Company shall keep true and accurate books of account, assay records and maps of any and all work and furnish to the Owner, by mailing to him at the close of each day's business, a copy of all daily reports showing the number of tons mined, number of tons milled, assay value of the heads and the assay value of the tails, and shall also furnish a copy of all monthly reports, by the superintendent or management, of development and operations and maps explanatory thereof, showing the operations thereof for each month, by mailing the same monthly to the Owner and shall also furnish the Owner, promptly upon the receipt of same, with a duplicate copy of all mint, smelter or other returns covering any and all shipments of ore or products shipped or sold from the property, and will, at the request of the Owner, notify the Owner as to any and all cleanup dates so that the Owner may have a representative present at such time, should it so desire.

15. No officers' salaries of the Operating Company shall be paid or accrue until such time as the operations of the property amount to One Hundred Fifty Thousand ($150,000.00) Dollars in net income. Thereafter the management fees of the Operating

Company shall be reasonable and such as are usually charged in similar active operations.

16. Except as otherwise provided in the Purchase Contract and the modifications thereof, the Operating Company shall not be required to mine, mill or otherwise operate the said properties during such time as it shall be prevented from so doing by causes beyond its control, including labor troubles or when the low grade of the ores or low metal prices shall render operations hereunder unprofitable, and during any such period or periods the Operating Company shall be excused from such performance excepting only the obligation to take care of said property as though it were the complete owner thereof and to maintain the same; Provided, however, that upon the removal of the cause of disability or of unprofitable conditions the Operating Company shall promptly resume and continue operations.

17. In the event that the operation of the said property at any time becomes unprofitable, whether by reason of ores of low grade or otherwise, development and other expenditures made by the Operating Company in an endeavor to restore the said property to a profitable operation shall be considered as expenditures by the Operating Company to which it is entitled to reimbursement as herein provided.

18. After the expenditure of Seventy Thousand ($70,000.00) Dollars herein by the Operating Company, it expressly reserves, and shall have, the right

to terminate this Agreement at any time during the period upon giving sixty days previous notice in writing to the Owner of its intention so to do, and upon the termination thereof the Operating Company shall have no further liability hereunder other than the distribution of any profits due the Owner up to the date of such termination, and the Owner shall be entitled to take possession of the said property and the Operating Company does hereby agree, upon the happening of such event, to reconvey and turn over to the Owner, the title and possession of the said property together with all right, title and interest of the Operating Company in and to all supplies, tools, machinery, implements, equipment and buildings placed thereon, and the Owner shall be entitled to the exclusive management and control thereof and to operate the same.

19. Any and all daily and monthly reports to be furnished to the Owner herein, shall be sufficiently given if sent to the Owner at its address herein given, and any other notice provided for herein shall be sufficiently given if sent by registered mail addressed to the party entitled to receive the same as follows:

To: Mutual Gold Corporation,
401 Fernwell Building,
Spokane, Washington.

To: .....
1418 Joseph Vance Building,
Seattle, Washington,

except as either party hereto shall hereafter instruct the other party by written notice to be appended to this agreement.

20. The Owner agrees to assume and pay any and all damages, if any, caused or arising out of the negligent operation of its property, if any, that may have resulted or result in the pollution of the waters of any stream or to the damage or injury of anyone entitled to the use of the waters of such stream, and that in the event of its failure so to do, that the Operating Company shall have, and is hereby given, the right to make any such settlement, compromise or defence of any and all such claims, demands and actions therefor upon such terms and conditions as it shall see fit and to reimburse itself for any and all sums so expended from the first funds available and that any and all damages so resulting from future operation of the property by the Operating Company shall be construed to be as an operating expense and shall be so treated.

21. It is further understood and agreed that the Operating Company shall have, and is hereby given, the right to sell or otherwise dispose of, for cash or otherwise, and on such terms and conditions as it shall decide upon, without accounting to the Owner therefor, any and all machinery, equipment and tools now on the property, and to use such funds as it sees fit.

22. It is further understood and agreed that the only supplies now remaining at the property

amount to approximately the sum of One Thousand ($1,000.00) Dollars, and that the Operating Company shall have, and is hereby given, the right to use and dispose of any and all such supplies, in such manner as it sees fit without accounting to the Owner therefor.

23. In the event that the Operating Company shall at any time advance for or on behalf of the Owner any funds for the payment of its office expense, running expense, operating expense , or otherwise, the Operating Company is hereby given the right and shall have the right to reimburse itself, for such funds so advanced or so paid, out of the first monies that would otherwise be due and payable to the Owner.

24. This Agreement shall inure to the benefit of and be binding upon the parties hereto, their successors and assigns, and shall be a covenant running with the land.

In Witness Whereof the said parties have caused these presents to be executed in their behalf by their respective officers thereunto duly authorized and their seals hereunto duly affixed and duly attested, as of the day and year first hereinabove written.

MUTUAL GOLD CORPORATION

By .....

President

Owner

Attest:

.....

Secretary.

.....

By .....

President

Operating Company.

Attest:

.....

Secretary.

Attached to this Contract were the following Exhibits—

Exhibit A—Purchase Contract—See Pages 1 to 9 of Contract File.

Exhibit B—Supplemental Agreement—See Pages 13-14 of Contract File.

———

PLAINTIFFS' EXHIBIT 10

Minutes of Meeting of Directors of
Mutual Gold Corporation
Held August 6, 1938

The Board of Directors of the Mutual Gold Corporation met at the office of the Company at 401 Fernwell Building, Spokane, Washington, on Saturday the 6th day of August, A. D., 1938, at the hour of 9:30 A. M. pursuant to adjournment.

The meeting was called to order by President J. E. Stiegler, who presided, Vice President R. P. Woodworth acting as Secretary.

The office of the company being crowded, the meeting was immediately adjourned to be convened at the office of the company at 745 Peyton Bldg., Spokane, Washington, at which place it forthwith reconvened.

Roll call showed following results:

Present—J. E. Stiegler, W. L. Grill, G. H. Ferbert, J. A. Vance, R. F. Collins, R. P. Woodworth

Absent—F. T. Hickcox.

Messrs. Lloyd J. Vance and R. J. Cole were also present.

Unapproved minutes of meetings were read, signed and approved.

Mr. Lloyd J. Vance presented an offer wherein he agreed to form a corporation to take over and manage the property of the company, a copy of which offer is attached to the minutes of the annual stockholders' meeting held on this date and hereby referred to and made a part hereof.

Mr. Woodworth presented forms of resolutions which he had prepared for submission to the stockholders that these matters might be properly presented to them and which resolutions conformed with the action taken by the directors at their last meeting. No objection was made thereto.

After some discussion, no action being taken, the meeting adjourned to be reconvened at the same place by the new Board of Directors immediately following the annual meeting of the stockholders.

The Board reconvened immediately following the annual meeting of the stockholders. Mr. J. E. Stieg-

ler was chosen temporary chairman and R. P. Woodworth temporary secretary.

Roll call showed the following results:

Present—J. E. Stiegler, W. L. Grill, G. H. Ferbert, J. A. Vance, R. F. Collins, R. P. Woodworth.

Absent—F. T. Hickcox.

The Directors present qualified by subscribing to the oath of office which was ordered inserted in the minute book immediately following the minutes of this meeting.

The following officers were duly nominated and elected:

J. E. Stiegler, President
J. A. Vance, Vice President
R. P. Woodworth, Vice President
R. F. Collins, Vice President
E. Fuson, Secretary
E. Fuson, Treasurer
E. D. Weller, Attorney

The officers elected, who were present, thereupon accepted the offices to which each had been elected.

Mr. Ferbert and Mr. Collins then stated that they would get Mr. Garbutt on the long distance 'phone and obtain from him a telegram setting forth the terms of his proposition to form a corporation to take over an manage the property, and that they would submit same to the Board, and requested that the meeting be adjourned to reconvene at 7:00 o'clock P. M. at 745 Peyton Building, Spokane, Washington. On motion duly made, seconded and carried, the meeting was adjourned to be reconvened

at 7:00 o'clock P. M. at 745 Peyton Building, Spokane, Washington.

The meeting reconvened at 7:00 o'clock P. M. on Saturday the 6th day of August, A. D., 1938, at 745 Peyton Building, Spokane, Washington, pursuant to adjournment.

The meeting was called to order by J. E. Stiegler, President, R. P. Woodworth, Vice President acting as recording officer. The same directors were present. Mr. Lloyd J. Vance and Mr. R. J. Cole were also present.

Mr. G. H. Ferbert moved that he and Mr. Collins be sent to Los Angeles to contact Mr. Garbutt and the company pay their expenses. There was no second to said motion, whereupon Mr. Ferbert moved that he and Russell Collins be sent to Los Angeles to contact Mr. Garbutt without expenses to endeavor to secure a contract with Mr. Garbutt. Mr. Grill moved an amendment to said motion, that they be required to report back immediately. The amendment was accepted by Mr. Ferbert and Mr. Collins, duly seconded, and put to a vote. Mr. Collins, Mr. Stiegler, Mr. Ferbert, and Mr. Grill voted in favor thereof. Mr. Vance and Mr. Woodworth voted against said motion.

Mr. Woodworth stated that in his opinion, in view of the fact that Mr. Ferbert and Mr. Collins were evidently interest parties, that he did not consider the motion had passed. Mr. Grill stated that it had passed and the directors voting in favor of said motion agreed with him.

Mr. Lloyd J. Vance thereupon presented the withdrawal of his offer and stated that unless the board intended to accept said offer at once that he wished to withdraw it.

Mr. Woodworth stated to the board that it was his opinion that the offer should be accepted at once; that the proposed form of contract submitted with said offer and as a part thereof, had been prepared by him, that if anything was to be done toward putting a mill on the property this year that action would have to be taken at once. That on the approval of Mr. Lloyd Vance's offer by the Board at its last meeting, believing that the stockholders would authorize the Board to enter into some such form of agreement, Mr. Cole, Mining Engineer, had been to California for Mr. Vance, that arrangements had already been made to put in the power line at once, that mill machinery and equipment capable of handling over 150 tons per day was ready to be moved in, and that trucks were already arranged for to haul it in as well as additional mine equipment and that everything was ready to move immediately if the Board would accept Mr. Vance's offer. That the proposed offer that Mr. Collins and Mr. Ferbert had stated they would be able to get from Mr. Garbutt, according to their own admissions, contained no better terms and in some respects was not so good in that there was no assurance that the stockholders would be permitted to participate therein the same manner. That no definite offer of any kind from Garbutt was before the

Board nor any definite assurance that any offer as favorable could be secured from him. That a definite concrete offer was before the Board as made by Mr. Vance. That it was admitted that the only deal which had been proposed to Mr. Garbutt was one based on the offer which Mr. Vance had made and the Board approved at its last meeting and that it was not fair or honest for the Board to turn down Mr. Vance's offer and that same should be accepted at once, and moved that it be so accepted.

It was moved by Mr. Grill, seconded by Mr. Ferbert that no action be taken on the offer of Mr. Lloyd J. Vance by the Board until report had been received as to what Mr. Garbut would do with respect to entering into a like contract with the company. The matter was put to a vote, Messrs. Grill, Stiegler, Collins and Ferbert voting in favor thereof, Mr. Vance and Mr. Woodworth voting against said motion. Mr. Vance's offer was thereupon withdrawn by him.

It was moved by Mr. Grill, seconded by Mr. Collins that the meeting be adjourned to be reconvened at the Vance Hotel, Seattle, Washington, on Saturday the 13th day of August, A. D., 1938, at 10:00 o'clock A. M. Messrs. Stiegler, Ferbert, Collins, Grill and Vance voted in favor of said motion, Mr. Woodworth voting against same.

.....

President.

.....

Recording Officer.

PLAINTIFFS' EXHIBIT 11

August 25, 1938

Mutual Gold Corporation
401 Fernwell Building
Spokane, Wash.
Gentlemen.

This will inform you that we have elected to cancel and we hereby cancel your option and contract to purchase the Log Cabin Mine, which option and which contract is dated July 13, 1932. This action is final and absolute.

We recognize that this cancellation, while legal, may work a great hardship upon your stockholders but should you wish to negotiate for rehabilitation of this contract you may negotiate with the undersigned who will give the matter consideration provided your defaults are cured and other points of difference are adjusted to his satisfaction.

(Signed) FRANK A. GARBUTT
Frank A. Garbutt—duly authorized representative of the owners, Chandis Securities Company and Alice Clark Ryan.

cc to
Mutual Gold Corporation
Box 377, Leevining, Cal.

cc to
Mutual Gold Corporation
Attention: Mr. J. A. Vance, General Manager,
Vance Hotel,
Seattle, Washington.

PLAINTIFFS' EXHIBIT 12

Frank A. Garbutt
Suite 712 - 411 West 7th Street
Los Angeles, California

September 2, 1938

Mutual Gold Corporation, and
J. A. Vance, General Manager,
Fernwell Building,
Spokane, Wash.

Gentlemen:

I have the letter of August 29th signed by J. A. Vance, General Manager Mutual Gold Corporation, addressed to me at 411 West Seventh Street, which states:

> "I cannot accept cancellation of the contract to purchase the Log Cabin Mine" . . . "The Mutual Gold Corporation has performed the contract on its part in every particular" . . . "I would thank you to specify the matters claimed to be in default" . . . "Please promptly advise me."

Although I think we have no obligation to acquaint you with your defaults, I will quote parts of your contract of July 13, 1932:

> "The said buyers agree to well and sufficiently timber the tunnels, shafts and drifts . . . and repair all old timbering in such workings and in all existing openings which are now open and which show any mill ore . . . for the preservation of said mine."

"After said shaft has been sunk to the intersection of the vein and drifted on for a distance of not less than 200 feet, if by that time sufficient tonnage of commercial ore is in sight to justify a mill, and if not, as soon as sufficient tonnage of commercial ore is in sight, the buyers agree to build a suitable mill and mill buildings and to install proper milling machinery for the economical and proper milling of said ore and to proceed without delay in a minerlike fashion to mill and market said ores which have been developed on said property".

"In consideration of the foregoing conditions . . . and in consideration of their faithfully keeping all of the covenants herein contained said sellers hereby give said buyers the right to purchase" . . .

"Time is of the essence of this agreement, and it is expressly agreed that in case of any violation by the buyers of any covenant herein contained or on their failure or refusal to carry out or comply with all of the terms and conditions of this agreement . . . the sellers at their election may terminate this agreement."

"In the event of a default by the said buyers in performing any of the conditions or covenants herein set forth . . . the sellers may at their option give notice to said buyers of the termination of this agreement by depositing such notice in the United States mail, registered and postage prepaid, addressed to said buyers at the

mine and at the last known postoffice address given to said sellers by said buyers, and the depositing of said notices and the affidavit by the sellers or any of them that same have been deposited shall be conclusive proof that the notices were given and this agreement shall be terminated thereby at the option of said sellers."

"The sellers may exercise said option and give such notice in accordance therewith."

Then follows another clause stating

"In the event of a default by the buyers in the performance of some covenant or conditions in itself immaterial and of which default they may be unaware the sellers, before giving notice as above set forth, shall notify said buyers of the default complained of and shall allow them thirty days from the date of giving said notice in which to cure same and remedy said defaults so complained of."

Your defaults do not come under this category. We are advised competently and with what we regard as absolute proof that in the fall of 1937 the shaft had reached the intersection of the vein, had been drifted on a distance of not less than 200 feet and that sufficient tonnage of commercial ore was in sight to justify a mill. However this may be, at some time shortly thereafter and, in any event, not later than early February, 1938, a large amount of commercial ore having been encountered you conspired with others interested in your venture to shut

down the property and, as you expressed it, "get hold of the contract." Pursuant to this plan you made efforts and caused efforts to be made to purchase the sellers' interest in the contract to you for less than it was worth, withholding from them and also, we are informed, withholding from some of your own stockholders and directors, true information of the condition of the mine. It was your plain duty, under the exact wording of your contract, to "build a suitable mill and mill buildings and to install proper milling machinery . . . and proceed without delay . . . to mill said ores."

That since the time of your discovery a period of six months has elapsed and prior thereto a considerable time elapsed during which you were wholly in default.

There are other grounds for default which it is not necessary to go into here. However, for your further information, will state that we have your admissions and the indisputable evidence of others that the milling equipment and machinery on the property is inadequate, not practical and not economical for the treatment of these ores.

A material consideration for the terms of payment given you was that you would proceed upon the development of ore to install proper milling machinery for the economical milling of said ore and to proceed without delay to mill said ores and to pay the proceeds to the sellers as in your contract provided.

Your fiction that you are not in default finds no favor in our eyes. It is wholly in accord with your past tactics of concealment and evasion of your responsibilities.

In our notice to you of August 25 we frankly stated our attitude toward the Mutual and the conditions under which we might negotiate for a rehabilitation of your contract.

The undersigned, as you are aware, has been negotiating with the Mutual for a contract looking to the operation of its property. I have no desire to undertake such responsibilities and the only consideration for so doing is to provide the stockholders with an alternative so that they would not be forced to accept the manifestly tricky and unfair contract that you have attempted to force upon them.

To show you the lack of esteem in which this effort of yours is held, I quote, in part, from one of the communications from a stockholder regarding it:

> "A goodly number of the stockholders have expressed their views and not one of them, excepting Woodworth, seemed in favor of it, and they run all the way from downright panic, bogged down like a cow in the mud, some few are quite bellicose and want to fight, and I think they would welcome anything of a constructive and fair nature that might give promise of pulling them out of the jam.
>
> "Personally, I think this proposal set forth by the Vances is one of the most vicious I have

seen, and I am doubtful if it could possibly get by the Security Act; if so I would have less faith in that law than I now have."

I trust I have made my position entirely clear. The owners have a friendly feeling for the stockholders as also have I, but my first duty is to the owners whom I represent.

Your liability for your acts or omissions is to your stockholders who, it seems to me, could recover from you if they lose their property by reason of your laches.

Yours truly,

(Signed) FRANK A. GARBUTT.

FAG-C

PLAINTIFFS' EXHIBIT 13

is set forth in the Complaint, as Exhibit 6 thereto, at page 51.

PLAINTIFFS' EXHIBIT 14

MINUTES OF ADJOURNED ANNUAL MEETING OF THE BOARD OF DIRECTORS OF MUTUAL GOLD CORPORATION

The adjourned annual meeting of the board of directors of Mutual Gold Corporation, a corporation, was held at the Vance Hotel in the City of Seattle, King County, Washington, beginning at 10 o'clock A. M. on the 7th day of September, 1938,

there being present Mr. J. E. Stiegler, Mr. J. A. Vance, Mr. F. T. Hickcox, Mr. R. P. Woodworth and Mr. W. L. Grill and Mr. G. H. Ferbert. Mr. Russell F. Collins was absent.

Mr. Grill made a brief report of the conferences had with Mr. Garbutt at Los Angeles and then read the contract between the Mutual Gold Corporation and Frank A. Garbutt, which had been executed by Mr. Garbutt and Mr. Stiegler, as the president of the corporation, subject to the ratification thereof by the board of directors of the company.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the action of the president of this company, Mr. J. E. Stiegler, in executing that certain written contract dated the 2nd day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, be ratified, approved and confirmed, as fully and to the same extent as though originally authorized by the board of directors of this company, and that the said contract be and the same is hereby ratified, approved and confirmed in all details; and that the president of this company, Mr. J. E. Stiegler, be and he hereby is authorized and directed to carry out and perform the same and to execute with the secretary of this company all deeds, bills of sale and documents of every kind and character whatsoever necessary to make said contract legally effective and to carry out the terms and provisions thereof, subject to the ratification of the action of the board thereon by a

special meeting of the stockholders to be called for such purpose.

It was moved by Mr. Woodworth and seconded by Mr. Vance, as a substitute motion, that the offer of Lloyd Vance be accepted. Mr. Woodworth and Mr. Vance voted in favor of said substitute motion and Mr. Hickcox, Mr. Ferbert and Mr. Grill voted against said substitute motion and the same was not carried.

Upon a vote being had upon the original motion, said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox and Mr. Grill. Mr. Woodworth and Mr. Vance voted "No" thereon.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that this corporation do and it hereby does accept that certain contract bearing date the 2nd day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, which contract has been read to the Board, and all of the terms and provisions thereof; and that the president of this corporation, Mr. J. E. Stiegler, be and he hereby is authorized and directed to execute said contract, if the previous ratification thereof is not legally sufficient for and on behalf of this corporation, and to execute any and all documents, papers, bills of sale, deeds and conveyances necessary to make said document legally effective and to carry out the terms, conditions and provisions thereof; this action of the board to be subject to ratification by the stockholders at a spe-

cial meeting to be called for such purpose. Said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox and Mr. Grill. Mr. Woodworth and Mr. Vance voted "No" thereon.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the president of this corporation, Mr. J. E. Stiegler, be and hereby is authorized and directed, for and on behalf of this corporation, to borrow the sum of $25,000 from any person, firm or corporation, upon the best terms possible, giving the note of this corporation or other written obligation, and for and on behalf of this corporation to execute a pledge or assignment of any or all of the assets of the corporation as security therefor. Said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox and Mr. Grill. Mr. Woodworth and Mr. Vance voted "No" thereon.

It was regularly moved by Mr. Woodworth and seconded by Mr. Vance that proxies for the said stockholders' meeting be sent out in blank to the stockholders of the company by the secretary. Upon a vote being had Mr. Vance and Mr. Woodworth voted in favor thereof and Mr. Ferbert, Mr. Hickcox and Mr. Grill voted against the same and said motion did not carry.

It was regularly moved by Mr. Grill and seconded by Mr. Hickcox that proxies be sent out by the secretary designating J. E. Stiegler or blank the proxy of such stockholder, to vote at said special meeting of the stockholders. Mr. Grill, Mr. Ferbert and Mr. Hickcox voted in favor thereof and Mr.

Vance and Mr. Woodworth voted against the said motion. Said motion was carried.

It was regularly moved, seconded and, upon a vote being had, carried, that the secretary of the corporation be and is authorized and directed to call a special meeting of the stockholders of the company at the earliest possible time, for the purpose of ratifying or refusing to ratify the action taken by the board in connection with the said contract dated the 2nd day of September, 1938, between Mutual Gold Corporation and Frank A. Garbutt, and that such meeting also be called for the consideration and acting upon the offer of Lloyd J. Vance, or any other offer from any other person, firm or corporation, and the authorization of the board to accept and execute the same.

No further business coming before the directors, the meeting thereupon adjourned.

(Signed) W. L. GRILL,
Secretary Pro Tem.

Mr. Anderson: Which will be Plaintiffs' Exhibit 14. I offer in evidence an unsigned letter dated September 9, 1938, to Mutual Gold Corporation, J. A. Vance, General Manager, and J. E. Stiegler, President; subject matter is notice of default, and I will ask counsel if he will stipulate that that was a copy of Mr. Garbutt's letter of that date and to those persons.

Mr. Hinckle: So stipulated.

Mr. Anderson: Do other counsel, if your Honor please, [39] likewise stipulate?

Mr. Grill: Yes; on the statements made.

The Court: It may be marked.

The Clerk: Exhibit 15. [40]

PLAINTIFFS' EXHIBIT 15

September 9, 1938

Mutual Gold Corporation,
Mr. J. A. Vance, General Manager,
Mr. J. E. Stiegler, President
401 Fernwell Building,
Spokane, Washington
Gentlemen:

On August 25th we served you with notice of default on your contract of July 13, 1932, and notified you of its termination and terminated it as in said contract provided.

In this same communication we also advised you of our willingness to negotiate for the reinstatement of said contract under certain conditions which have not been met.

Instead we received a communication from your Manager, J. A. Vance, declining to "accept cancellation" and stating:

> "Mutual Gold Corporation has performed the contract on its part in every particular."

This is so far from the truth that we now, without prejudice to said termination of August 25, 1938, again inform you that, in accordance with the terms

of said agreement of July 13, 1932, we have elected to terminate, and do hereby terminate, your option and contract under said agreement to purchase the Log Cabin Mines and other property described in said agreement, and do hereby terminate said agreement in its entirety.

Also that we will not negotiate for a reinstatement of same unless and until we receive from you a statement in writing satisfactory to us as to the reason for your breaches of the following conditions of your contract and your acts and statements following:

1. Your agreement to keep the ore intact above the 125 foot level.

2. Post non-liability notices and maintain same after posting.

3. Repair and keep in repair all old timbering in existing openings.

4. Strictly comply with the Workmen's Compensation Act.

5. Install a proper mill for the economical and proper milling of said ore.

6. Proceed without delay to mine, mill and market said ores.

7. To impound all mill tailings which assay over $1.00 per ton.

8. Pay to the sellers any excess over $8.00 per ton.

9. Work continuously not less than 150 shifts of competent miners per month.

10. Obtain and furnish to the sellers a release or waiver from your vendors before you allow any material, machinery or supplies to be brought upon said property.

11. Obtain like releases from all employees and furnish same to sellers before employing any labor.

12. Your ordering our representative off of the property.

13. Your concealment from us of material information.

14. Your statement that "Mutual Gold Corporation has performed the contract on its part in every particular". As long as you take this position, there can be no negotiations.

Copies to
Mutual Gold Corporation
Box 377, Leevining, Cal.
Mutual Gold Corporation,
Attention: Mr. J. A. Vance, Gen. Mgr.

PLAINTIFFS' EXHIBIT 16

Mutual Gold Corporation
401 Fernwell Building
Spokane, Wash.

Directors

J. A. Vance, Seattle, Wash.
Russell F. Collins, Leevining, Cal.
R. P. Woodworth, Spokane, Wash.
J. E. Stiegler, Naches, Wash.
W. L. Grill, Seattle, Wash.
F. T. Hickcox, Tacoma, Wash.
G. H. Ferbert, Naches, Wash.

Officers

J. E. Stiegler, President
R. P. Woodworth, Vice-President
J. A. Vance, Vice-President
Russell F. Collins, Vice-President
E. Fuson, Secy.-Treas.

September 12, 1938.

To the Stockholders of Mutual Gold Corporation:

The stockholders of the company at the annual meeting held on the 6th day of August, 1938, authorized the board of directors to sell, lease, deal with, exchange or dispose of any part of or all of the assets of the corporation, for cash or otherwise, including exchanging for shares in another corporation, domestic or foreign, as they in their discretion might deem expedient, advisable or desirable.

Prior thereto there had been submitted to the board of directors an offer by Lloyd J. Vance. At

the meeting of the board of directors following the stockholders' meeting, the board was advised that an offer would be received from Mr. Cecil B. deMille. The board meeting was adjourned to a subsequent date, at which a proposal was submitted, which proposition was considered by the board and attempts made to secure certain changes therein. The board deemed it advisable to consider such proposition, as it was presented by Mr. Frank A. Garbutt, the agent of the owners of the Log Cabin group of claims.

During the course of the consideration of the respective offers, a notice of cancellation of the company's contract of purchase covering the Log Cabin group of claims was received by the company, which notice was signed by Mr. Frank A. Garbutt.

In order to bring the matter to a head, the board authorized Mr. Stiegler, Mr. Ferbert, Mr. Vance, Mr. Hickcox and Mr. Grill to go to California and confer with Mr. Garbutt. Thereupon, Mr. Ferbert, Mr. Collins, Mr. Grill and the writer conferred with Mr. Garbutt at Los Angeles and certain modifications of the contract proposed by Mr. Garbutt were obtained and a contract signed by the writer, as president of the company, subject to ratification by the board. The terms of the contract were the best it was possible to obtain from Mr. Garbutt.

A board meeting was held on the 7th day of September, at which the action of the president of the company was ratified and the contract approved by the board, subject to its ratification by the stock-

holders of the company. The board members voting in favor of the ratification were Mr. Ferbert, Mr. Hickcox, Mr. Grill and Mr. Stiegler. Those voting against were Mr. Woodworth and Mr. Vance. The writer was advised that the contract was approved by Mr. Collins, the one director absent. It was the feeling of the writer, as well as the other members of the board voting in favor of the contract, that if it was not accepted the company would become involved in long and expensive litigation with the owners of the property over the attempted cancellation of the contract, and even though the company were ultimately successful in such litigation, little might remain for the stockholders after the termination thereof.

The writer wishes to state that if a longer time had been available, and the conditions different, a much better contract might have been obtained from other sources. However, in view of the entire situation and the fact that the company has unpaid obligations and no funds to carry on, the board members voting in favor of the proposition felt that the company had no alternative.

You will find enclosed herewith proxy made out in favor of the writer or blank. The writer wishes you to feel at liberty to exercise your best judgment in the matter and if you wish to have your proxy run to anyone else, eliminate his name and place the name of anyone you desire therein, if it is impossible for you to be personally present at the stock-

holders' meeting. However, the undersigned urges you to be either present at said meeting or represented by proxy.

Sincerely yours,

J. E. STIEGLER,

JES:pb President.

PLAINTIFFS' EXHIBIT 17

NOTICE OF SPECIAL MEETING OF STOCKHOLDERS OF MUTUAL GOLD CORPORATION

Notice Is Hereby Given that in accordance with Resolution of the board of directors of Mutual Gold Corporation passed on September 7, 1938, a special meeting of the stockholders of said corporation will be held at the office of the company at 401 Fernwell Building, Spokane, Washington, on September 24th, 1938, at eleven o'clock A. M. for the purpose of ratifying or refusing to ratify the action taken by the said board of directors in accepting a certain contract, dated September 2nd, 1938, by and between Mutual Gold Corporation and Frank A. Garbutt, said acceptance being subject to ratification by the stockholders at a special meeting called for that purpose and to consider at said meeting and pass upon the offer of Lloyd J. Vance or any other offer from any other person, firm or corporation, includ-

ing authorization to the board of directors to accept and execute same.

MUTUAL GOLD CORPORATION,
By E. FUSON,
Secretary.

[Written on reverse side.]

Sept 15-1938

Mr. Vance:

I am sending you my proxy as if I send it to Spokane it may be lost.

Thanks for your letter.

JENNIE M. TATTERSALL

PLAINTIFFS' EXHIBIT 18

(Postcard addressed to)

Mutual Gold Corporation,
Fernwell Building,
Spokane, Wash.

PROXY

Know All Men By These Presents that I, the undersigned, do hereby constitute and appoint R. P. Woodworth my true and lawful attorney to represent me at the special meeting of the stockholders of Mutual Gold Corporation to be held on the 24th day of September, 1938, at eleven o'clock A. M. at the office of the company, 401 Fernwell Building, Spokane, Washington, and do hereby authorize and

empower him to vote at said meeting and at any adjournment thereof for me and in my name and stead upon the stock then standing in my name on the books of said company, and I hereby grant my said attorney all the powers that I should possess if personally present at said meeting.

Witness my signature this 15th day of September, 1938.

JENNIE M. TATTERSALL

Witnessed By:

GEO. G. HANNAN

PLAINTIFF'S EXHIBIT 19

Mutual Gold Corporation
401 Fernwell Building
Spokane, Wash.

September 16, 1938.

J. E. Stiegler
R. P. Woodworth
J. A. Vance
Russell F. Collins
W. L. Grill
F. T. Hickcox
G. H. Ferbert
Directors of Mutual Gold Corporation:

Notice is hereby given that a Special Meeting of the Board of Directors of the Mutual Gold Cor-

poration is called to be held at 610 Colman Building, Seattle, Washington on Monday, the 19th day of September, 1938 at the hour of 10:00 o'clock A. M. for the purpose of reconsidering the action taken by said Board upon the ratification by the Board of the contract between Frank A. Garbutt and the Mutual Gold Corporation dated September 2, 1938 and the further purpose of considering any other proposal that may be brought before said meeting for the development and operation of the Mutual Gold Corporation properties in Mono County, California, and any other matters incident or pertaining to the aforementioned business.

(Signed) J. E. STIEGLER
President

PLAINTIFFS' EXHIBIT 20

Frank A. Garbutt
Suite 712—411 West Seventh Street
Los Angeles, California
September 12, 1938.

Mr. M. F. Haley,
Leevining, Cal.
Dear Mr. Haley:

When I talked with you last Saturday and Sunday you were to gather certain information and write me your conclusions and recommendations at once with a list of what changes you wanted to make and what you needed to start up the mill with-

out delay. A week later I have not heard from you.

I promised to write you not later than Wednesday afternoon or Thursday morning and this I did. Knowing your condition as you told it to me, I put you on my payroll for two weeks so you could bridge over the delay without hardship to yourself until the mine would be ready to employ you.

I am particular about keeping any promises I make and like those with whom I plan to become associated to be the same. Otherwise there can be no mutual confidence.

Sincerely,
F. A. GARBUTT.

FAG-C.

P. S. You will not, of course, go on my payroll until you commence work.

F. A. G.

PLAINTIFFS' EXHIBIT 21

(Post Card Addressed to)

Lloyd J. Vance,
Joseph Vance Bldg., Spokane, Wash.

Spokane, Washington
September 20, 1938

Stockholders of Mutual Gold Corp.:

On Monday, September 19, 1938 your Board of Directors reconsidered their previous action upon the proposed contract with Mr. Frank A. Gar-

butt regarding the operation of the Mutual Gold mining property and ratified and approved same in accordance with the stockholders' authority of August 6th, 1938.

It will therefore not be necessary to hold the Special Stockholders' Meeting called for September 24th, and same is cancelled by order of the Board.

J. E. STIEGLER
President

PLAINTIFFS' EXHIBIT 22

Minutes of Special Meeting of Directors of Mutual Gold Corporation

Pursuant to due notice, a special meeting of the board of directors of Mutual Gold Corporation was held at 610 Colman Building, in the city of Seattle, King County, Washington, beginning at 10 o'clock a. m. on Monday, the 19th day of September, 1938, there being present Mr. J. E. Stiegler, Mr. J. A. Vance, Mr. G. H. Ferbert, Mr. F. T. Hickcox, Mr. R. P. Woodworth, Mr. W. L. Grill and Mr. Russell F. Collins.

The President asked Mr. Grill to act as secretary of the meeting.

The secretary of the meeting read the notice calling the meeting and the affidavit of the secretary of the company regarding the mailing of the notice.

The secretary of the meeting thereupon read the last notice of cancellation given by the owners of the Log Cabin mining claims.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the board reconsider the action taken by it at its meeting on the 7th day of September upon the following proceedings:

> It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the action of the president of this company, Mr. J. E. Stiegler, in executing that certain written contract dated the 2d day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, be ratified, approved and confirmed, as fully and to the same extent as though originally authorized by the board of directors of this company, and that the said contract be and the same is hereby ratified, approved and confirmed in all details; and that the president of this company, Mr. J. E. Stiegler, be and he hereby is authorized and directed to carry out and perform the same and to execute with the secretary of this company all deeds, bills of sale and documents of every kind and character whatsoever necessary to make said contract legally effective and to carry out the terms and provisions thereof, subject to the ratification of the action of the board thereon by a special meeting of the stockholders to be called for such purpose. * * *

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that this corporation do and it hereby does accept that certain contract bearing date the 2d day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, which contract has been read to the board, and all of the terms and provisions thereof; and that the president of this corporation, Mr. J. E. Stiegler, be and he hereby is authorized and directed to execute said contract, if the previous ratifications thereof is not legally sufficient for and on behalf of this corporation, and to execute any and all documents, papers, bills of sale, deeds and conveyances necessary to make said document legally effective and to carry out the terms, conditions and provisions thereof; this action of the board to be subject to ratification by the stockholders at a special meeting to be called for such purpose.

The following voted in favor of said motion: Mr. Stiegler, Mr. Ferbert, Mr. Collins, Mr. Hickcox and Mr. Grill; and the following against said motion: Mr. Woodworth and Mr. Vance. The President declared the motion carried.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that, in view of the authority and power given to the board of directors by the stockholders at a special meeting of the stockholders called on the 6th day of August, 1938, and in view

of the present financial condition of the company, the action of the president of this company, Mr. J. E. Stiegler, in executing that certain written contract dated the 2d day of September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, be ratified, approved and confirmed, as fully and to the same extent as though originally authorized by the board of directors of this company, and that the said contract be and the same is hereby ratified, approved and confirmed in all details; and that the president of this company, Mr. J. E. Stiegler, be and he hereby is authorized and directed to carry out and perform the same and to execute with the secretary of this company all deeds, bills of sale and documents of every kind and character whatsoever necessary to make said contract legally effective and to carry out the terms and provisions thereof. Upon a vote being had upon said motion, said motion was carried by the votes of Mr. Hickcox, Mr. Collins, Mr. Grill, Mr. Stiegler, and Mr. Ferbert. Mr. Woodworth and Mr. Vance voted "No" upon said motion.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that, in view of the authority and power given to the board of directors by the stockholders at a special meeting of the stockholders called on the 6th day of August, 1938, and in view of the present financial condition of the company, this corporation do and it hereby does accept that certain contract bearing date the 2d day of

September, 1938, between Mutual Gold Corporation, a corporation, and Frank A. Garbutt, and all of the terms and provisions thereof; and that the president of this corporation, Mr. J. E. Stiegler, be and he hereby is authorized and directed to execute said contract, if the previous ratification thereof is not legally sufficient for and on behalf of this corporation, and to execute any and all documents, papers, bills of sale, deeds and conveyances necessary to make said document legally effective and to carry out the terms, conditions and provisions thereof. Said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Collins, Mr. Hickcox and Mr. Grill. Mr. Vance and Mr. Woodworth voted "No" thereon.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the president of this corporation, Mr. J. E. Stiegler be and hereby is authorized and directed, for and on behalf of this corporation, to borrow the sum of $25,000 from any person, firm or corporation, upon the best terms possible, giving the note of this corporation or other written obligation, and for and on behalf of this corporation to execute a pledge or assignment of any or all of the assets of the corporation as security therefor. Said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox, Mr. Collins and Mr. Grill. Mr. Woodworth and Mr. Vance votes "No" thereon.

Mr. Woodworth thereupon presented his resignation as vice-president and a director of the com-

pany, to take effect immediately. Mr. Vance thereupon presented his resignation as vice-president and director, to take effect immediately, and would not reconsider such action. Said resignations were thereupon duly and regularly accepted.

Mr. E. D. Weller was thereupon duly and regularly elected vice-president of the company, to fill out the unexpired term of R. P. Woodworth, resigned, as vice-president of the company, to serve until his successor shall be elected and shall qualify.

Mr. Vance thereupon presented to the meeting the statements of Mr. J. R. Sturgeon for compensation and Mr. M. F. Haley for overtime. No action was taken thereon at the meeting.

It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the secretary of the company be authorized and directed to notify the stockholders of the company of the action of the board in ratifying and/or authorizing and approving the contract of F. A. Garbutt, and to further notify the stockholders that the special meeting of the said stockholders called for the 24th day of September, 1938, had been called off by the board. Upon a vote being had, said motion was carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox, Mr. Collins and Mr. Grill. Mr. Vance and Mr. Woodworth voted "No" thereon.

No further business coming before the directors, the meeting thereupon adjourned.

(Signed) W. L. GRILL
Secretary of the Meeting

PLAINTIFFS' EXHIBIT 23

is set forth in the Complaint, as Exhibit 7 thereto, at page 58.

PLAINTIFFS' EXHIBIT 24

is set forth in the Complaint, as Exhibit 8 thereto, at page 60.

PLAINTIFFS' EXHIBIT 25

is set forth in the Complaint, as Exhibit 9 thereto, at page 62.

PLAINTIFFS' EXHIBIT 26

Frank A. Garbutt
Suite 712—411 West Seventh Street
Los Angeles, California

September 23, 1938

To the Board of Directors
Mutual Gold Corporation,
Mr. J. E. Stiegler, President.

Progress Report

Your bargain with me and its purposes have been thoroughly discussed heretofore with a majority of your Board and your attorney. I expect to interest in your enterprise entirely satisfactory and responsible parties and I hope that my connection therewith will prove to be only a stop-gap for I

have no desire, at my age, to again become actively interested in mining.

I have also heretofore made it sufficiently clear to you that my first duty is to the owners of the property, whom I represent, but that this duty is not necessarily incompatible with a desire to protect your stockholders.

Time is a very essential element with you and for one reason or another not necessary to go into here, a lot of time you could ill afford has been wasted.

Early in the fall of 1937 you had reached the 250 level and drifted into mill ore at which time under your contract you were obligated to build a suitable mill for the economical and proper milling of the ore and to proceed without delay to market same.

This you did not proceed to do. To the contrary, these facts were concealed from the owners while your manager attempted to buy out the owners at an unfair discount and as late as the early part of February wrote to an associate as follows:

> ". . . under the circumstances we can't do anything except fire the whole crew and shut down or get ahold of the contract."

This was a deliberate and willful violation of your contract and for this and other reasons, the owners, when the true conditions became known to them, served upon you a notice of termination of your contract in accordance with its terms.

Prior to this, however, your manager still delayed complying with your contract with the owners while he attempted to negotiate a contract with either himself or his son which looked to giving them control of the property upon terms which your directors state were wholly unsatisfactory.

This delay extended up to the latter part of June and culminated at a stockholders' meeting in August, 1938, at which a report by Mr. Cole was presented to your stockholders. This report purported to have been made some time in June and various metallurgical determinations set forth therein were dated June 14 and June 20th, respectively.

These delays are further rendered inexcusable by the fact that your manager had received a written report from Mr. Keily, dated March 10, acquainting him with the true conditions at the mine which formed a record which also aids the owners in establishing a willful violation of their contract.

However, who ever caused these delays, the effects are the same except insofar as liability therefor is concerned. The time is gone and your position is jeopardized.

When you entered into your contract with me and its ratification was delayed for one reason or another while your opposing factions argued their differences, I realized that a loss of this season would be fatal to you and therefore, knowing that whatever the outcome a power line would be absolutely necessary, I guaranteed the Power Company the

cost of their survey and preliminary work to the trifling amount of $500.00.

On receipt of your wire of September 19th that my contract had been fully authorized, I have done the following things:

1. Immediately ordered the power line, paid $11,000 therefor and received the assurances of the Company that it would be completed by October 15th, and sooner if possible.

2. Engaged Mr. Russell Collins, one of your directors, to act as assistant in the field to expedite all work as much as possible; to keep in touch with your Board of Directors and obtain your advice and to keep you informed of the progress of our work.

3. I have engaged Mr. M. F. Haley, formerly in your employ, who was most highly recommended to me by Mr. Keily a few days before he died, and called him here in consultation. Being a practical mill man myself, it gives me pleasure to state I have found Mr. Haley to be thoroughly familiar with all of the details of his business and so far we have been in thorough agreement as to past operations and future procedure. I have had assays made for him so he could inform himself as to past results and estimate the future. We have discussed and listed his requirements and have ordered such things as required time to get and are receiving bids on current material and supplies, such as electric lamps, wiring, electric material, etc.

4. Have gone into the matter of tailings disposal and water pollution which appears to be a sticker with no possible satisfactory solution that does not involve future development from a different shaft in the distant future and have, I hope, devolved a temporary plan upon which Messrs. Collins, Haley, Sturgeon and I can agree for the immediate present that will enable us to acquire data and work out a feasible plan for the future. We have discussed this problem at length with competent engineers of the Western Machinery Co. and, after several days of figuring, they frankly admit their inability to solve it in a satisfactory manner. I have communicated with expert engineering firms in Salt Lake and Denver in an endeavor to find a solution. I am also working on a novel solution of my own which gives some promise.

5. We are lining up for consideration the necessary equipment, hoist, cage, compressor, cars, jackhammers, receiver, mill, etc.

6. Metallurgical Investigations: I want to say in this connection that I have thoroughly studied Mr. Cole's report and, while not wishing to be considered as criticizing it in any way for what it purports to be, I do not find it either satisfactory or convincing.

Briefly, his heads and values are computed in various ways $12.60 - $13.40 - $11.20 - $15.65 - $20.30 and $13.00 and recovery by amalgamation from $8.50 to $5.60. I do not say that his computations are not correct or justified.

Neither do I say that the metallurgical investigations your manager had made in Los Angeles and Berkeley are not correct as far as they go but to me they are superficial and unconvincing and I believe it would be extremely hazardous to select and install a mill without further knowledge.

I have therefore sent a 150 lb. sample to the Colorado School of Mines, at Golden, whose equipment and experience are unexcelled for making metallurgical determinations; am consulting a leading engineering firm of Denver; have sent two 50 lb. samples to John Herman, of Los Angeles, who is well equipped for the determinations I desire to make here (he has done work for me for 20 years) and his reputation for care and accuracy is unsurpassed. I am consulting with R. A. Perez & Co. who made some of the tests for Mr. Vance; am making some tests in my own laboratory, which is well equipped and has been in continuous operation for 9 years, and will take such other steps as common prudence and these investigations dictate.

You will be kept advised through Mr. Collins of results.

In addition to the above and in view of your problems I recently visited Bodie, where a friend, Mr. Klipstein, is operating a large mill similar in flow to the one we propose to install, and the Empire, at Grass Valley, where a friend, Mr. Nobs, who has known me for 20 years, is in charge of an 80 stamp mill and cyanide plant, etc. of 400 tons daily ca-

pacity, about such a plant as we might use, so as to acquaint myself with modern practice.

I wish to assure you that as long as I am connected with the management that every stockholder, large or small, myself included, will receive exactly the same treatment.

There will be no withholding or coloring of information. No director, myself included, will receive any consideration as such. We are trustees for the stockholders. If we sink we will sink together. If we profit, we will profit proportionately. There will be no dodging of my responsibility to any stockholder of any corporation of which I am director or manager.

If you should have any cause for dissatisfaction I trust you will immediately communicate with me so that we may thrash it out without delay. I also want the benefit of all of the advice and suggestions that you can give me. We have a tough job and I want to do my part well.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

PLAINTIFFS' EXHIBIT 27

MUTUAL GOLD CORPORATION
401 Fernwell Building
Spokane, Washington

September 26, 1938.

To the Stockholders of
Mutual Gold Corporation:

In connection with the deal which the company has concluded with Mr. Frank A. Garbutt, you will find enclosed herewith copy of a report which he has just sent to the board of directors of the Mutual Gold Corporation, which is self-explanatory.

Owing to the lateness of the season, it is impossible to purchase and install a new mill before next year. It appears from Mr. Garbutt's report that he plans to operate the property during the winter if weather conditions permit by making necessary changes so as to permit such operation. This should be for the best interests of the Mutual, as four or five months' further development work should result in the blocking out of a much larger body of ore. If this is the result, then it may be possible that Mr. Garbutt will construct a larger mill than his contract provides.

There is no question in my mind or in the minds of the members of the board that all of the stockholders of the Mutual Gold Corporation will be treated fairly and squarely by Mr. Garbutt and that their interests in the long run will have a greater value than if any other offer had been ac-

cepted, which would have occasioned unending litigation. The writer has been advised that various members of the board will send out letters to the stockholders giving their views of the entire situation.

You may also rest assured that the board of directors of the company, after a full and thorough consideration of the matter, did what in its judgment it deemed for the best interests of the company.

You will be kept informed from time to time as to the affairs of the company and the operation of the mine.

Yours sincerely,
J. E. STIEGLER
President

JES:pb

PLAINTIFFS' EXHIBIT 28

October 3, 1938.

Mutual Gold Corporation,
Mr. J. A. Vance, General Manager,
Vance Hotel, Seattle, Wash.

Gentlemen:

Under date of August 25th, 1938, our representative, Frank A. Garbutt, served upon you a notice of termination of our contract with you as in said contract provided, absolute in its terms, but which left the door open to negotiations for a reinstatement if undertaken by you at that time.

Instead of opening such negotiations you replied on August 29th, 1938

"Mr. Frank A. Garbutt
411 West Seventh Street
Los Angeles, California.

Dear Sir:

A copy of your letter of August 25, 1938 to Mutual Gold Corporation has been received by me. As general manager of Mutual Gold Corporation and as a director I cannot accept cancellation of the contract to purchase Log Cabin Mine.

Mutual Gold Corporation has performed the contract on its part in every particular, and until now there has not been the slightest intimation that its performance was not satisfactory to the owners. I would thank you to specify the matters claimed to be defaults, and also the points of difference to which reference is made in your letter. Please promptly advise me.

Very truly yours,
J. A. VANCE
General Manager, Mutual Gold Corporation."

We considered your statement not in accordance with the facts and, therefore, served a second notice of termination upon you in order to cure any possible technical defects in the previous notice.

Mr. Garbutt informed us that at the earnest solicitation of some of your directors and stockholders, he attempted to find parties who would help you in your financing and, failing in this, that he told you he would find $10,000 for you with which to make the payment due November 1st so that you would have time to turn around and not be coerced into signing any contract unsatisfactory to you.

He informs us also that as a result of further negotiations he entered into a contract with you, designed as a stop-gap to enable you to proceed to do the things your contract with us called for until someone else could be found to help you; also that in accordance therewith you have assigned to him your interest in your agreement with us. However, we find that such assignment does not conform to the requirements of your agreement with us and before we take up any negotiations looking to a renewal of your contract we desire that you be represented by a duly authorized representative in addition to your assignee.

He also stated to you, so we are informed, that his connection with you would have no influence upon whether or not we rehabilitated your contract, and this is true.

Mr. Garbutt has approached us seeking a reinstatement of your contract which we have declined under all of the circumstances as stated by him, among which are that in hope of such reinstatement he has expended a considerable sum of money in building a power line to the property and for

other things designed to allow an early compliance with your terminated contract with us which money was advanced without our knowledge and was necessarily at his own risk.

Mr. Garbutt has also informed us of your own internal dissensions, and of the opposition in certain quarters to him and his contract, in all of which we have no direct concern.

In view of all of the circumstances we are relieving Mr. Garbutt of the responsibility of representing us and you will, in event you desire to communicate further, address us individually; Chandis Securities Company, Times Building, Los Angeles, attention of Harry Chandler, and Alice Clark Ryan, 112 South Orlando Street, Los Angeles.

We have a friendly feeling for Mr. Russell Collins through whom most of our business has been done and we have no desire to work a hardship upon your stockholders, many of whom we believe are in ignorance of the true conditions, but:

We are not satisfied with the way you have evaded carrying our your contract with us nor pleased with your Managing Director, Mr. Vance's uncandid statement to us that "you have complied with your contract in every particular", when you well know this is not true and, in view of the many concessions we have made you in the past we are not pleased by your concealment from us of developments at the mine; nor by the excuse of your manager's attorney that you had no contractual ob-

ligation to inform us; nor by his contention that our failure to take action sooner, constituted a waiver of the many breaches of your contract, and we are not at all reassured by your internal dissensions, nor by the threats of litigation amongst yourselves which it appears have been extended to covertly include us.

As long as this is possible or theratened, you may expect no consideration from us.

If our former contract could not be enforced for the reasons intimated, that is sufficient reason in itself for our reluctance to reinstate it.

However, we still do not desire to close the door against further negotiations and, as your time is short, we state our position as follows:

We consider your former contract as terminated and at an end. We are willing to enter into negotiations looking toward making a new one provided such negotiations are instituted at once and completed before November 1st, 1938.

We would expect such new contract, amongst other things, to provide full protection for us against such eventualities as led up to the termination of your former contract and against such threats as its termination brought forth as well as against happening which might impair our security.

We would be pleased to receive a statement of your position and your views on the subject and an intimation of the course you intend to pursue.

Also it may save time if you will designate a person to represent you in these negotiations.

Yours truly,

CHANDIS SECURITIES COMPANY

By HARRY CHANDLER
President

ALICE CLARK RYAN

PLAINTIFFS' EXHIBIT 30

Minutes of Special Meeting of Directors of Mutual Gold Corporation

Pursuant to due waiver of notice, a special meeting of the directors of Mutual Gold Corporation, a corporation, was held at 610 Colman Building in the City of Seattle, King County, Washington, on Friday, the 21st of October, 1938, there being present Mr. Stiegler, Mr. Ferbert, Mr. Hickcox and Mr. Grill. Mr. Collins was absent.

The meeting was called to order by Mr. Stiegler, the President, who presided.

The following resolutions were duly introduced, discussed and, upon a vote being had, unanimously adopted:

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill, directors, be and they hereby are authorized and directed to go to California to negotiate with Mr. Garbutt with reference to cancellation of his contract, and for the negotiating with him to secure

the advances which he has made or may hereafter make as required by his contract, or negotiate for such other arrangements therefor as may be for the best interests of the company; and

Be It Further Resolved that Mr. G. H. Ferbert and Mr. W. L. Grill are hereby authorized and directed to arrange, if they deem it advisable, for the organization of a new corporation under the laws of California or any other state, with a par value of $10,000, divided into 10,000 shares, or such other par value or number of shares as they might deem advisable, and to subscribe to said shares for and on behalf of the Mutual Gold Corporation.

Resolved, that in the event such corporation is organized, Mr. G. H. Ferbert and Mr. W. L. Grill be and they hereby are authorized and directed to arrange for the transfer of mining claims, contract and machinery from Frank A. Garbutt to said new corporation in connection with the termination of the said contract with Frank A. Garbutt, if the same shall be terminated.

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill be and they hereby authorized to designate the temporary directors of such new corporation, if one be organized.

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill be and they hereby are authorized and directed to negotiate for and on behalf of this company with Mr. Frank A. Garbutt for the obtaining of a new contract, if Mr. Frank A. Garbutt is desirous

of entering into a new contract after the termination of the present one, any and all of such terms to be wholly subject to the subsequent approval, confirmation and ratification of the board of directors.

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill be and they hereby are authorized and directed to enter into negotiations for and on behalf of the company in connection with the existing contract of Mr. Frank A. Garbutt, and any new contract, if any, which he may desire to submit to Mutual Gold Corporation, which negotiations shall be completely subject to the approval, confirmation and ratification of the board of directors of the Mutual Gold Corporation.

Resolved, that Mr. G. H. Ferbert and Mr. W. L. Grill be and they are hereby authorized and directed to negotiate a loan in the sum of $10,000 to pay for the subscription of $10,000 to the new company, in the event that a new company is organized.

Mr. Grill thereupon suggested that a director be appointed to fill out the unexpired term of Mr. R. P. Woodworth, resigned, and Mr. A. P. Bowes was duly nominated and, upon a vote being had, elected as a director of the company, to fill out the said unexpired term of Mr. Woodworth, and to serve until the next regular annual meeting of the stockholders and until his successor is elected and shall qualify.

No further business coming before the directors, the meeting thereupon adjourned.

W. L. GRILL
Secretary Pro Tem

PLAINTIFFS' EXHIBIT 32

is set forth in the Complaint, as Exhibit 10 thereto, at page 65.

PLAINTIFFS' EXHIBIT 34

Minutes of Special Meeting of Directors of Mutual Gold Corporation

Pursuant to due waiver of notice and consent thereto, a special meeting of the directors of Mutual Gold Corporation, a corporation, was held on Monday, the 7th day of November, 1938, at 610 Colman Building in the city of Seattle, King County, Washington, there being present Mr. J. E. Stiegler, Mr. F. T. Hickcox, Mr. W. L. Grill and Mr. A. P. Bowes, constituting a majority of the directors of the company.

The meeting was called to order by the President, Mr. J. E. Stiegler, who presided.

Mr. Grill fully reported the results of his meeting with Mr. Garbutt in Los Angeles on October 31 and November 1 and 2.

Mr. Grill also reported that he and Mr. Ferbert had acknowledged receipt, on behalf of the Mutual Gold Corporation, of notice of withdrawal of the

company's contract of September 2 and September 22, 1938, with Mr. Frank A. Garbutt, and also the execution of an agreement with Mr. Garbutt by Mr. Grill and Mr. Ferbert, as directors and representatives of the Mutual Gold Corporation, dated November 1, 1938, subject to the ratification and approval of the board of directors.

The following resolution was duly introduced, discussed and upon a vote being had, unanimously adopted:

Resolved, that the execution of that certain contract read to the board, dated the first day of November, 1938, between Mutual Gold Corporation and Frank A. Garbutt, signed by W. L. Grill and G. H. Ferbert, as representatives and directors of the Mutual Gold Corporation, be and the same is hereby ratified, approved and confirmed as the contract of the Mutual Gold Corporation; and

Be It Further Resolved, that if for any reason the signatures of the said W. L. Grill and G. H. Ferbert are in any way insufficient, the President of this corporation, J. E. Stiegler, be and he hereby is authorized and directed to execute the said agreement as President of the corporation.

The following resolution was duly introduced, discussed and, upon a vote being had, unanimously adopted:

Resolved, that the President of this corporation be and he hereby is authorized and directed to execute a conditional sale contract covering the pur-

chase of certain mining machinery and equipment with the Western Machinery Company, which contract was read to the board.

No further business coming before the board, the meeting thereupon adjourned.

W. L. GRILL
Secretary pro tem.

PLAINTIFFS' EXHIBIT 36

MUTUAL GOLD CORPORATION

401 Fernwell Building
Spokane, Washington

December 1, 1938.

Mutual Gold Corporation Stockholders:

Enclosed herewith please find Progress Report recently sent to the Board of Directors of Mutual Gold Corporation by Mr. Frank A. Garbutt.

It is the intention of the Board to send reports to the stockholders from time to time so that they may keep posted on the affairs of the Company.

Very truly yours,
MUTUAL GOLD CORPORATION
By J. E. STIEGLER
President.

Enc.

PLAINTIFFS' EXHIBIT 37

Minutes of Special Meeting of Directors of Mutual Gold Corporation

Pursuant to the consent of all directors of the company, a special meeting of the board of directors of Mutual Gold Corporation, a corporation, was held at 610 Colman Building in the city of Seattle, King County, Washington, on Monday, the 28th day of November, 1938, at the hour of 10 o'clock A. M., there being present a majority of the board of directors.

The meeting was called to order by the President, Mr. J. E. Stiegler, who presided.

The meeting considered the contracts presented by Mr. Garbutt and authorized Mr. W. L. Grill to prepare a contract as nearly along the lines of the old contract as possible, consistent with certain ideas Mr. Garbutt desired incorporated in it.

The meeting was thereupon adjourned to the 9th day of December, 1938, at the hour of 10 o'clock a. m., to meet at 610 Colman Building, Seattle, Washington.

W. L. GRILL
Secretary Pro Tem.

PLAINTIFFS' EXHIBIT 38

Minutes of Adjourned Special Meeting of Directors of Mutual Gold Corporation

Pursuant to notice given at the special meeting of the directors of Mutual Gold Corporation held on the 28th day of November, 1938, which was adjourned to the 9th day of December, 1938, a special meeting of the directors of said Mutual Gold Corporation, a corporation, was held at 610 Colman Building, Seattle, King County, Washington, on Friday, the 9th day of December, 1938, at the hour of 10 o'clock a. m., there being present a majority of the directors of the company.

The meeting was called to order by Mr. Stiegler, the President, who presided.

Mr. Grill stated the progress that had been made in connection with the making of a new contract with Mr. Garbutt; he stated that he had drawn up a proposed contract and sent it to Mr. Garbutt, who apparently wanted some changes in it and was studying it.

It was duly moved, seconded and carried that the president and secretary of the company be authorized and directed to execute a request addressed to Mr. Frank A. Garbutt, requesting him to advance such monies as may be necessary to complete the pipe line, repair the mill, pay taxes, etc. in getting the property ready for operation, and that such advances will be covered by notes as provided in contract with Mr. Garbutt dated November 1, 1938.

No further business coming before the directors at this time, the meeting was adjourned until December 17, 1938, at 10 o'clock a. m.

.....

Secretary pro tem.

Approved:

J. E. STIEGLER

A. P. BOWES

Directors.

PLAINTIFFS' EXHIBIT 39

Minutes of Special Meeting of Directors of Mutual Gold Corporation

Pursuant to notice and consent, a special meeting of the directors of Mutual Gold Corporation, a corporation, was held at 610 Colman Building in the city of Seattle, King County, Washington, on Saturday, the 17th day of December, 1938, at the hour of 10:00 o'clock a. m., there being present at said meeting Messrs. J. E. Stiegler, F. T. Hickcox, W. L. Grill and A. P. Bowes.

The meeting was called to order by the President, Mr. Stiegler, who asked Mr. Grill to act as secretary of the meeting.

After discussing the affairs of the company, the following resolution was introduced, seconded and, upon a vote being had, unanimously adopted:

Whereas, this corporation has been negotiating for some few weeks with Mr. Frank A. Garbutt for

a contract along the lines of the contract made with him on or about September 2 and 22, 1938; and

Whereas, the terms of such contract have been practically agreed upon; and

Whereas, the form of such contract has been read to and studied by the board; and

Whereas, it will be for the best interests of this company that said contract be entered into; now, therefore,

Be It Resolved that this company enter into said contract with said Frank A. Garbutt, which contract has been fully read, discussed and studied by the board; and

Be It Further Resolved, that the president and secretary of this corporation be and they hereby are authorized and directed to execute said contract for and on behalf of this company, and to affix the seal of this company thereto.

Be It Further Resolved, that the President of this corporation be and he hereby is authorized and directed to deliver said contract to said Frank A. Garbutt and to Log Cabin Mines Company, a corporation.

Mr. Tom L. Wyckoff was thereupon duly nominated to serve as director of the company, to fill out the unexpired term of Mr. J. A. Vance, resigned, and to serve until the next regular annual meeting of the stockholders of the company and until his successor shall be elected and shall qualify. Upon a vote, Mr. Wyckoff was unanimously elected such director.

No further business coming before the directors, the meeting thereupon adjourned.

W. L. GRILL
Secretary pro tem.

PLAINTIFFS' EXHIBIT 40

is set forth in the Complaint, as Exhibit 11 thereto, at page 69

PLAINTIFFS' EXHIBIT 41

Minutes of the Fourth Meeting of the Board of Directors of Log Cabin Mines Company

On January 4, 1939, at 12:00 o'clock noon, the fourth meeting of the board of directors of the Log Cabin Mines Company was held at 411 West Seventh Street, Los Angeles, California, Room 712. Directors S. C. Hall, Chas. F. Hathaway, G. H. Ferbert, and Russell F. Collins were present. Director William L. Grill was absent, but the secretary had received from him a telegram which read as follows:

January 4, 1939

You Have My Permission Hold Meeting Log Cabin Approve Contract and Other Matters in Connection With Contract.

W. L. GRILL.

The meeting was called to order by Mr. S. C. Hall, president, who stated that the purpose of the meet-

ing was to consider whether the corporation should execute a certain contract that had been prepared under date of December 17, 1938, in which Mutual Gold Corporation was the first party, Frank A. Garbutt was the second party, and Log Cabin Mines Company was the third party. Mr. Hall further stated that as he understood it, the proposed contract was intended to accomplish substantially the results aimed at in a contract dated September 2, 1938, and a contract dated September 22, 1938, between Mutual Gold Corporation as the first party and Frank A. Garbutt as the second party, which contracts had been terminated by the mutual consent of the parties thereto on or about November 1, 1938. After extended discussion, it was, on motion of Mr. Ferbert seconded by Mr. Collins and carried by the affirmative vote of all directors present,

Resolved that the president and the secretary of this corporation be, and they are hereby, authorized, empowered, and directed to execute and deliver on behalf of this corporation that certain contract bearing date December 17, 1938, in which Mutual Gold Corporation is the first party, and Frank A. Garbutt is the second party, and this corporation is the third party, which said contract has already been executed by the Mutual Gold Corporation.

Mr. Collins then tendered the following written resignation:

Mr. S. C. Hall, President,
Log Cabin Mines Company,
Los Angeles, California.

Dear Mr. Hall:

I hereby tender my resignation as a director of Log Cabin Mines Company to take effect immediately.

(s) RUSSELL F. COLLINS

On motion made by Mr. Ferbert, seconded by Mr. Hathaway, and approved by the affirmative vote of all directors present, the resignation was accepted.

Mr. Ferbert then nominated Mr. A. R. Carter, formerly a director, to fill the vacancy on the board made by Mr. Collins' resignation. Mr. Hathaway seconded the nomination. No other nominations being made, the nominations were closed on motion of Mr. Hathaway, seconded by Mr. Ferbert, and carried by the unanimous vote of all the directors present. The question of Mr. Carter's election then being put before the board, he was unanimously chosen.

There being no other matters to come before the meeting it was adjourned by affirmative vote of all directors present on motion made by Mr. Ferbert and seconded by Mr. Hathaway.

CHAS. F. HATHAWAY
Secretary.

We the undersigned, being all the board of directors of Log Cabin Mines Company at the time the meeting referred to in the foregoing minutes was

called to order, do hereby waive notice of the time and place of the meeting of said board held at 12:00 o'clock noon on January 4, 1939 at 411 West Seventh Street, Los Angeles, California, in Room 712; and we hereby approve the foregoing minutes of the proceedings had at said meeting.

Dated, January 4, 1939 S. C. HALL
Dated, January 4, 1939 CHAS. F. HATHAWAY
Dated, January 4, 1939 G. H. FERBERT
Dated, January 4, 1939 RUSSELL F. COLLINS
Dated, January 5, 1939 WILLIAM L. GRILL

I, the undersigned, being the person who was elected to the board of directors of Log Cabin Mines Company at the meeting referred to in the foregoing minutes, do hereby waive notice of the time and place of said meeting held at 12:00 o'clock noon on January 4, 1939 at 411 West Seventh Street, Los Angeles, California, in Room 712; and I do hereby approve the foregoing minutes of the proceedings had at said meeting.

Dated, January 4, 1939.

A. C. CARTER.

PLAINTIFFS' EXHIBIT 42

FRANK A. GARBUTT

Suite 712 - 411 West Seventh Street
Los Angeles, Cal.

To the Board of Directors, Mutual Gold
Corporation,
Mr. J. E. Stiegler, President.

Progress Report

My last report was made to you November 22, 1938, Since then, however, your Board of Directors has been kept in close touch with all operations by means of daily air mail letters to your President at Naches; your director, Mr. Grill, at Seattle; and your Director, Mr. Ferbert, at Long Beach, together with copies of much of the routine correspondence involved.

Director Russell Collins has kept in close touch by personal contact, so that your Board has been fully informed at all times and has been consulted in advance of any work contemplated and their advice sought and carefully considered.

I feel, and I think you agree that your Board of Directors are functioning one hundred per cent in controlling and conducting your Company's affairs, being enabled to do so intelligently by the completeness and promptness with which all information reaches them.

It pleases me to state that the Company's business as far as I can see, is gradually getting into a bet-

ter and sounder condition and, although there are innumerable things to do to protect your titles and develop your property that they are being given proper attention as expeditiously as opportunity affords.

Among other things referred to are:

Your Relationship With the Owners. Although you made your last payment promptly you are still in default as to many material things, some of which, as, for example, failure to impound your tailings can not be corrected. While not waiving these various defaults the owners have shown a disposition to be lenient and, although I can not guarantee it, am hopeful that we will have no serious trouble with such matters, this particular one being dependent upon what damage may occur to parties owning property below us.

Titles to Your Holdings. It is important that some of your claims should be patented without further delays. This is being studied. It is to some extent dependent upon the weather as survey by the U. S. Deputy Surveyors are amongst the necessary steps. There are also some matters of policy to be considered.

The title to your water is going to be questioned and the legalities involved are being carefully examined into. We have obtained copies of the briefs from the attorneys who tried some of the City's cases who were my attorneys for over twenty years and the law and the facts are being briefed for our protection.

Road Development. For twenty-five years the operators of this property, including ourselves, have been wasting money in hauling over and attempting to maintain impossible roads and prohibitive grades.

I am not discussing here the developing of the Mine itself nor the planning of a proper process nor the building of a suitable mill. These subjects are too complicated to be determined finally with our present knowledge.

As you know, they are being studied intensively and work is being expedited as rapidly as business prudence and good judgment will permit. You are completely familiar with all of the considerations governing this but it is appropriate to say that I am not displeased with the progress made with our metallurgical and physical problems.

Before a study of these matters can be completed it will be necessary to operate the property and ascertain a great many things not now known in order to secure the best approximate results both in operation and in initial expenditure. This work is receiving my best attention as you are completely aware. We have tied ourselves to no one engineering firm but are consulting the best technical and operating skill in the United States and in the final analysis will be governed by our own knowledge and not by any individual opinion for, while our operations are small, they are vital to us and we can not afford to take any chances.

Now as to details to date:

1. Our power line, as previously reported, is complete, as is also another power line 1,500 feet

long, with butt-treated poles to serve the four pumps for our tailing disposal line.

2. A transformer of our own for electric lighting and a lighting system have been installed to replace the inadequate and expensive contraption we had.

3. We have completed the installation of a tailings line about 2600 feet long to the Federal Site and built a dam there; thus affording a safe place for the disposal of our tailings and insuring a future compliance with this provision of our contract. While this operation will be temporarily troublesome and expensive it is the only possible procedure that is entirely safe that is open to us under present conditions.

4. The 2,800-foot, 8-inch pipe line from the drain tunnel to "the sink" for the disposal of our "red" mine water has been completed and insofar as possible, protected. Its upper end is 16-inch. Mr. Sturgeon came well within his estimate on the cost of this installation.

5. Considerable trenching has been completed on the hill side to protect the drainage tunnel from continued damage by surface water and, in Mr. Collins' opinion, to minimize the chance of liability from the unimpounded tailings. I have no worthwhile opinion on this.

6. The installation of the electric hoist is completed and my advice is that it is operating satisfactorily.

7. The cage is also operating satisfactorily in the shaft.

8. New mine cars are on hand.

9. The compressor is complete.

10. We are placing the one-inch compressed air line throughout the mine with 2-inch galvanized pipe.

11. The old stamp mill has been completely overhauled. It is ready to run. I expect trouble with it, especially its ore elevating system which was so impossible before.

If this mill stands up, I have a plan for utilizing it for secondary crushing in the future which will salvage a part of its cost, in which case it will be further remodeled in the spring. Nothing but a trial can determine this.

12. Compressor and Hoist house is complete.

13. Heaters, as before reported, are installed.

14. All payrolls have, of course, been met promptly.

15. An intensive study of our metallurgical and operating problems has been and is being made and I am pleased to report substantial progress and the accumulation of much reliable information.

16. Preliminary surveys have been made by competent engineers of new roads, and their feasibility at a reasonable cost is assured. The construction, however, must await spring and the thawing of the ground. Possibly $2,500 or $3,000 will cover this cost.

17. We have been favored so far by a very open winter. We can not haul in the daytime but can haul at night when the ground is frozen.

18. Last week we put about 60,000 feet of mine timbers on the hill.

19. New jack hammers have been bought and received.

20. I have bought and delivered to the mine supplies consisting of fuel oil, coal, carbide, steel, track, provisions, drills, explosives, equipment, etc., and barring accidents and after the usual adjustments we are ready to run and I am very much in hope we will be able to run throughout the winter. In fact, I expect it. This will enable us to gain much needed information.

We have spent $50,253.87 to date and I do not believe $500 of this has been wasted. On the other hand I have saved the Company more than ten times this amount that I know of by close personal attention to detail. Of this amount $10,000 was for your payment to the owners; $11,000 for payment for your major power line; $7,220.72 for consumable supplies for winter operations, and $14,274.37 for equipment such as compressor, hoist, pipe lines, auxiliary power line, mill motors, lighting plant, mine cars, new jackhammers, electric wiring, etc.

In concluding allow me to thank you gentlemen for your splendid cooperation and understanding. Your suggestions and advice have been timely and excellent and it is a pleasure to work with people who are familiar with the situation and who do not think that all you have to do is to buy something called a mill and start paying dividends.

The landscape is dotted with that kind of mills that never earn a dividend.

I wish you could find some way of acquainting your stockholders with the conditions, what you have accomplished and what you have gone through in the past for their sake. A few words on paper cannot begin to tell this story.

The devotion of Russell Collins to the interests of the Mutual is touching in the extreme. I know that he has gone hungry and cold in his endeavors to pull them out of the hole they had, through no fault of his, gotten into.

Your President and also Director Ferbert have shown a willingness to sacrifice not only their time but also their money to benefit the stockholders and this, may I state, is in such marked contrast to the usual corporation director who is generally concerned only in protecting his own interests that it has furnished the inspiration and the incentive to me to carry on at a time when the association promised to become an unpleasant one.

Nor can I close without paying tribute to the faithful cooperation of our men at the mine and especially our underground man, Mr. Sturgeon, and our mill man, Mr. Haley. They have worked hard and faithfully for the Company and it is due to their devoted efforts that we are able to run this winter.

For example, our eight-inch pipe line was finished, well under Mr. Sturgeon's estimate of cost, on a day

when six inches of snow was blown off of the mountain by a howling blizzard.

They have given me at all times faithful cooperation even when perhaps they did not agree with what I was doing and I can depend on them to voice their independent opinions and then do their best to prove that they were wrong if I over-rule them. More than this, no manager can ask of any head of a department.

We all know the irreparable loss that the death of Mr. Keily was to the enterprise and to all of us.

While he had not been with me for several years on account of my retirement from mining, he has been in my employ without missing a pay day for 17½ years during which time he never received less than $300 per month and expenses.

Mr. Keily was a mining engineer of unusual ability in addition to being a practical miner and it was with a heavy heart that I consented to go on with you when he passed away for I had no hallucinations about the trouble and detail involved.

That with your cooperation this work bids fair to become more of a pleasure than a burden is the highest compliment I can pay you and I am endeavoring to so arrange your affairs that if anything happens to me that you would not be adversely affected.

In conclusion, may I sum up by saying that with economical and disinterested management and by building up an efficient and loyal organization we

have a fair chance of success. You may depend upon my best endeavors.

I have heard of efforts being made by unknown parties to buy stock cheap. I wish you could find some way to advise your stockholders to hold on to their stock. My interests are not for sale.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

PLAINTIFFS' EXHIBIT 43

Mutual Gold Corporation
401 Fernwell Building
Spokane, Washington

January 14, 1939

To the Stockholders of Mutual Gold Corporation:

You will find enclosed herewith notice of Annual Meeting of the stockholders of the company, to be held on the date fixed by the by-laws.

You will also find enclosed herewith latest progress report of Mr. Frank A. Garbutt. You will note from this that Mr. Garbutt has expended $50,253.87, up to January 8, all of which expenditures were necessary before the property could be put in operation.

The drain tunnel to the sink and the installation of the tailings line were necessary to keep the water and the tailings out of the creek which runs through Mrs. Cunningham's property. An effort was made

by Mr. Garbutt to make a satisfactory arrangement with Mrs. Cunningham to use the creek for water and tailings disposal, but without success. During a period of prior management a disposal line from the mouth of the drain tunnel to the sink was constructed at a considerable expense, but it was not properly constructed, thus necessitating a new installation. The new installation is now constructed at a proper grade and should cause no further trouble to the company.

The mine was ready to commence operations several days ago, but at the last minute it was found that the water pipe leading to the property was frozen at some point and the getting of this line in operation occasioned some delay. However, the mill began operating on January 12, 1939.

Mr. Garbutt has kept the directors fully informed of what is transpiring at the property, and has outlined to them from time to time for their approval the work which he is undertaking. This is something which has never occurred before. Mr. Garbutt is also making a study of the ore and the property, so as to determine the proper equipment for obtaining the best recoveries from the ore. He is doing this in a very thorough manner and I have no doubt that when he finally recommends what equipment should be placed upon the property for this purpose, it will be successful.

It has been a real pleasure to the writer, and I feel also to the board, to have a man in charge of

the operation who not only knows what he is doing, but who does not hesitate to do it when he finds out what should be done. Mr. Garbutt realizes better than anyone else that the property will have to have the most economical kind of operation to be successful, and you may rest assured that it will have just that kind of operation. He was severely handicapped owing to the shortness of time which he had to attempt to get the property in operation this year. I may also frankly say in this connection that I doubt very much if we could have found another person in the United States as well qualified in every respect to handle this property.

As you are doubtless aware, a number of months this year were lost, during which the board was considering the offer of the Vance interests and the one made by Mr. Garbutt. After long delay and much opposition, the board finally concluded that it would be for the best interests of all the stockholders to accept Mr. Garbutt's offer, which was reduced to a contract. This contract was more than lived up to by Mr. Garbutt. For various reasons, however, he desired to terminate the contract and a new one has been prepared which has met the approval of the board but has not yet been executed and delivered to the company by Mr. Garbutt. We should have some word on it before the stockholders' meeting.

The company has a serious controversy with Mr. Vance. When the deal with Mr. Garbutt was closed,

Mr. Vance insisted upon the immediate payment of the production notes, as well as certain advances which he claims to have made on the company's behalf. Of course it was impossible to make any immediate settlement. He later modified his demands and insisted upon said advances being repaid within one year and the production notes at a later date. No settlement could be made along this line until the company knew when it might have sufficient resources to take care of any settlement which it might make. If such a settlement were made and the company unable to meet the obligations when they fell due, then the interests of the stockholders would be completely wiped out, and this is what the directors are desirous of avoiding. Whenever Mr. Vance is willing to make an arrangement which will not jeopardize the interests of the stockholders, the present board of directors will meet him more than half way.

You will find enclosed herewith a proxy, which is self-explanatory. If you desire to continue the present management of the company's affairs and the present board, which has and will work for the best interests of all of the stockholders, kindly sign the enclosed proxy and return to the office of the company. If, on the other hand, you feel that the present board has not worked unselfishly and for your best interests, do not hesitate to vote for anyone you desire, because we are all working for one end, and that is to make the property and the company a success.

You may be informed prior to the stockholders' meeting that many things may occur detrimental to your interests because of the arrangement made with Mr. Garbutt. In this connection please bear in mind that certain statements were made to some of you at the time the contract was first entered into as to what would happen if the contract was made. Certainly none of these things has happened and you are now in a position to judge performance against any assertions of what may occur in the future.

It is the writer's personal opinion, in conclusion, that the stockholders will be highly satisfied with Mr. Garbutt's operation during the coming year and that they may expect a fair and square deal from him.

Yours sincerely,
MUTUAL GOLD CORPORATION,
By J. E. STIEGLER,
President.

PLAINTIFFS' EXHIBIT 44

MINUTES OF THE FIFTH MEETING OF THE BOARD OF DIRECTORS OF LOG CABIN MINES COMPANY

On March 6, 1939, at 11:00 o'clock a. m., the fifth meeting of the board of directors of the Log Cabin Mines Company was held at 411 West Seventh Street, Los Angeles, California, Room 712. Direc-

tors S. C. Hall, Charles F. Hathaway, G. H. Ferbert, and A. R. Carter were present. Director William L. Grill was absent.

The meeting was called to order by S. C. Hall, president, who stated that the purpose of the meeting was to determine whether to exercise the option the corporation had to purchase the Clark-Ryan-Collins contract of July 13, 1932, now held by the Mutual Gold Mining Corporation, together with the other property of said Mutual Gold Mining Corporation, all of which, pursuant to the terms of the contract of December 17, 1938, executed by the Mutual Gold Corporation, Mr. Frank A. Garbutt, and this corporation, had been transferred to Mr. Garbutt as trustee. After discussion, the following resolution was proposed by Mr. Carter, seconded by Mr. Hathaway, and adopted unanimously:

"Resolved that the president and the secretary of this corporation be, and they are hereby, authorized, empowered and directed to exercise the option given in that contract dated December 17, 1938 executed by Mutual Gold Corporation, Frank A. Garbutt, and this corporation, to purchase for the sum of $10.00 the following properties:

a. All the personal property belonging to Mutual Gold Corporation and located at the Log Cabin Mines in Mono County, near Leevining, California, which property is described in a bill of sale given by Mutual Gold Corporation to Frank A. Garbutt under date of September 22, 1938 and recorded on

November 7, 1938 in Book 14, at page 322, Official Records of said Mono County.

b. All the real property interest, if any, belonging to said Mutual Gold Corporation in Mono County, California, which interest is described in that certain mining deed given by said Mutual Gold Corporation to Frank A. Garbutt under date of September 21, 1938 and recorded on November 7, 1938 in Book 14, at page 321, Official Records of said Mono County.

c. That contract dated July 13, 1932 (and the modifications thereof) to sell the Log Cabin group of mines near Leevining in said Mono County, which contract was executed by M. N. Clark, Alice Clark Ryan, and Chandis Securities Company as vendors and by Russell F. Collins and Ben L. Collins as vendees, and was heretofore sold and assigned by said Russell F. Collins and Ben L. Collins to said Mutual Gold Corporation.

Mr. Hall then called attention to the fact that the escrow ordered by the Commissioner of Corporations had not been terminated, and suggested that it might be well while the board was in session to adopt a resolution authorizing the officers to make application to the commissioner for termination of said escrow at the proper time. On motion of Mr. Hathaway, seconded by Mr. Ferbert, the following resolution was unanimously adopted:

Resolved that the president and the secretary of this corporation be, and they are hereby authorized,

empowered, and directed to make application, at such time as in their discretion may seem proper, to the Commissioner of Corporations for the State of California to terminate the escrow which, in the permit granted by him to this corporation on October 21, 1938 to sell stock, he ordered to be opened.

There being no further matters to come before the meeting, it was adjourned by the affirmative vote of all directors present on motion made by Mr. Carter and seconded by Mr. Hathaway.

CHAS. F. HATHAWAY
Secretary

We, the undersigned, being all the board of directors of Log Cabin Mines Company at the time the meeting referred to in the foregoing meeting was held, do hereby waive notice of the time and place of said meeting; and we hereby approve the foregoing minutes of the proceedings had at said meeting.

Dated, March 6, 1939
S. C. HALL

Dated, March 6, 1939
CHAS. F. HATHAWAY

Dated, March 6, 1939
G. H. FERBERT

Dated, March 6, 1939
A. R. CARTER

Dated, March 7, 1939
WILLIAM L. GRILL

PLAINTIFFS' EXHIBIT 45

is set forth in the Complaint, as Exhibit 12 thereto, at page 84.

PLAINTIFFS' EXHIBIT 46

is set forth in the Complaint, as Exhibit 13 thereto, at page 88.

PLAINTIFFS' EXHIBIT 47

is set forth in the Complaint, as Exhibit 14 thereto, at page 92.

Mr. Anderson: That is Plaintiffs' Exhibit 51.

I offer in evidence mining deed dated August 9, 1939, from Mutual Gold Corporation to Log Cabin Mines Company, [50] covering the so-called omitted mining claims.

The Clerk: 52.

Mr. Anderson: It is

PLAINTIFFS' EXHIBIT 52. [51]

set forth in the complaint as Exhibit 15 thereto, at page 94.

PLAINTIFFS' EXHIBIT 60

SCHEDULE OF DIRECTORS AND OFFICERS OF LOG CABIN MINES COMPANY

N. B. Red ink underlining indicates directors or officers who were at the same time directors or officers of Mutual Gold Corporation.)

[Printer's Note: Red ink underlining is indicated by italics.]

Meeting of October 19, 1938:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter
George H. Blake
Frederick J. Ott

Officers (elected at this meeting):

President—S. C. Hall
Vice president—Charles F. Hathaway
Secretary-Treasurer—A. R. Carter
Ass't Secretary—George H. Blake
Ass't Treasurer—Frederick J. Ott

Meeting of October 26, 1938:

Directors:

Same as on October 19, 1938

Officers:

Same as on October 19, 1938

Meeting of November 2, 1938:

Directors:

Charles F. Hathaway

S. C. Hall

A. R. Carter (resigned at this meeting)

Russell F. Collins (elected in place of Carter)

George H. Blake (resigned at this meeting)

William J. Grill (elected in place of Blake)

Frederick J. Ott (resigned at this meeting)

G. H. Ferbert (elected in place of Ott)

Officers:

President—S. C. Hall

Vice president—Charles F. Hathaway (resigned at this meeting)

Secretary-Treasurer—A. R. Carter (resigned at this meeting)

Charles F. Hathaway (elected in place of Carter)

Ass't Secretary—George H. Blake (resigned at this meeting)

William L. Grill (elected in place of Blake)

Ass't Treasurer—Frederick J. Ott (resigned at this meeting)

Meeting of January 4, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
G. H. Ferbert
Russell F. Collins (resigned at this meeting)
A. R. Carter (elected in place of Collins)
William L. Grill

Officers:

President—S. C. Hall
Vice president—Vacant
Secretary-Treasurer—Charles F. Hathaway
Ass't Secretary—*William L. Grill*
Ass't Treasurer—Vacant

Meeting of March 6, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
G. H. Ferbert
A. R. Carter
William L. Grill

Officers:

Same as on January 4, 1939.

Meeting of April 13, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
G. H. Ferbert
A. R. Carter
William L. Grill (resigned at this meeting —vacancy not filled)

Officers:

Same as on January 4, 1939.

Meeting of April 17, 1939:

Directors:

Same as on April 13, 1939.

Officers:

Same as on January 4, 1939.

Meeting of April 27, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter
G. H. Ferbert (resigned at this meeting— vacancy not filled)

Officers:

Same as on January 4, 1939

Meeting of May 26, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter

Officers:

Same as on January 4, 1939.

Meeting of August 23, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter
Frederick J. Ott (elected at this meeting)

Officers:

Same as on January 4, 1939.

Meeting of October 20, 1939:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter
Frederick J. Ott
Frank A. Garbutt (elected at this meeting)

Officers:

Same as on January 4, 1939.

Meeting of January 15, 1940:

Directors:

Charles F. Hathaway
S. C. Hall
A. R. Carter (resigned at this meeting)
Frederick J. Ott (resigned at this meeting)
Frank A. Garbutt
William L. Grill (elected at this meeting)
G. H. Ferbert (elected at this meeting)

Officers:

Same as on January 4, 1939.

PLAINTIFFS' EXHIBIT 62

Frank A. Garbutt
Suite 712—411 West Seventh Street
Los Angeles, California

Nov. 5, 1938.

Mr. M. F. Haley,
Log Cabin Mine,
Leevining, Cal.

Dear Mr. Haley:

I have your letter of November 1, enclosing the two orders, signed by you and Mr. Sturgeon, for which I thank you.

It is not always possible or even desirable to explain to you why I give a positive order. When I do so you may be certain that I had a good and sufficient reason therefor and that I want it obeyed.

In this case I do not blame you for not understanding the matter but there are certain legal significances connected therewith that there is no reason why I should explain.

I will say this much, however, that at the time I issued this order I was carrying on these operations in my own name and that to have done otherwise would have made me liable for any damage the Mutual might have caused in the past or may cause in the future, an obligation which I would not undertake.

In addition to the above, in my opinion and in the opinion of the Mutual's attorney, such action not only protected me but did not weaken their position.

This is more, I believe, than I should say under the circumstances but I want to lessen some of your fears.

I have turned the property back to the Mutual and it is free to do what it sees fit.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

Mr. Anderson: If your Honor please, I desire to read the testimony of Robert J. Cole who signed the report just introduced in evidence as Plaintiffs' Exhibit 64, which testimony was given in the [69] case heretofore referred to: Vance, et al. v. Mutual Gold Corporation, and Vance vs. Mutual Gold Corporation.

The Court: May I ask the purpose?

Mr. Anderson: The purpose of this is to supplement and sustain this report, this report being an exhibit in this case; and also to show evidence as to the values of this property. We have alleged that we——

The Court: Do counsel stipulate? Is that part of the stipulation that the witnesses' testimony in the Washington case may be read here the same as if they were present?

Mr. Hinckle: Yes, your Honor.

Mr. Anderson: That was covered in the stipulation that I addressed to your Honor this morning.

The Court: I just wondered.

Mr. Anderson: (Reading)

"ROBERT J. COLE,

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:" [70]

Mr. Moore: Q. You explained certain ores were developed, that is, certain reserves had been exposed? A. Yes.

Q. And you testified as to the amount of those reserves, didn't you? A. I think I did.

Q. In your opinion as a mining engineer and experience you have related you have had, state whether or not, in your judgment, those reserves could have been milled and the ore extracted at a profit with the equipment then at the mine?

A. With the equipment then at the mine I doubt whether they could have been treated at a profit. [106-7]

Cross Examination

By Mr. Heil: [108]

Q. As I understand your testimony, you do not recommend the continuation of the operation of that property with the mill that was there? A. No.

Q. And in order to operate it profitably would you say that an expenditure of between $100,000 and $150,000 might be required?

A. It could have been that much, depending on conditions, as to how you wanted to spend your money.

Q. It would depend on whether you bought new or used equipment? [112]

RUSSELL F. COLLINS,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. Russell F. Collins.

Direct Examination [137]

Q. You are familiar with the contract of September 2, 1938 involved in this lawsuit, are you not?

A. I think so; yes.

Q. Were you present when it was signed?

A. 1938. Well, my recollection is that I was present when it was signed.

Q. Where was it signed?

A. My memory don't carry me back to the exact location or place where it was signed, now, Mr. Abel.

Q. Were you present—you are familiar with——

A. Let me get that date straight. Hold on. That is in September, 1938?

Q. September 2, 1938.

The Court: That is the first contract involved.

Mr. Abel: The first contract involved in this lawsuit.

A. I think it was in Mr. Garbutt's office, if I am not mistaken.

Q. Who was present at that time?

A. Now, I don't——

Q. If that was the place?

A. I couldn't be positive, but my recollection is that Mr. Grill and Mr. Ferbert, I think, and I believe Mr. Stiegler. I am not sure but there were

(Testimony of Russell F. Collins.)

some others—and [138] I think Mr. Garbutt. I am not sure whether Mr. Garbutt was there or not. I would not be sure as to that.

Q. Are you familiar with the duplicate contract of September 22, 1938, being a duplicate of the contract of September 2, 1938?

A. A duplicate or a supplement or supplementary——

Q. It was the same contract bearing a later date, was it not? A. Well, it probably was.

Q. Were you present when that instrument was signed?

A. Now I wouldn't be sure as to that. I went to the mine and I wouldn't be right sure as to that second date referred to.

Q. You went to the mine from what place?

A. From Los Angeles.

Q. When did you enter the service of the defendant Garbutt in connection with the matter under consideration here? A. Well,—— [139]

Q. By Mr. Abel: I am speaking of your initial service.

A. Well, there was a transition period there in which Mr. Garbutt was, I would say, a trustee or acting in the capacity of a trusteeship, and I was not out of the employ, as I understood it at least, of the Mutual Gold interests at any time.

Q. You are shown a check for $50 bearing the signature "Frank A. Garbutt", dated September

(Testimony of Russell F. Collins.)

27, 1938. Do you identify that as a check that you received from him about that date?

A. That bears my signature and I am sure that is a check that I received from him. Yes.

Q. When did you receive it?

A. Well, my recollection is that I didn't have money to go to Leevining and so Mr. Garbutt was advised of that and gave me a check to bear my expenses. I had already spent all the money that I could raise from the other sources.

Q. Just be responsive. A. All right.

Q. I am just trying to find out when you received it. A. All right.

Q. Do you recall the circumstances under which you [140] received it?

A. Well, that is my recollection of it, that I was needing some money to go to the mine. That is my recollection, that I used that check in paying my expenses from here to Leevining and after I got there for a while.

Q. Then, the issuance of that check to you and your collection of that amount, $50, preceded your employment by Mr. Garbutt in connection with this mining property?

A. Well, if you mean to say that that was prior to the final taking over by the Log Cabin; yes.

Q. No. It was before you had rendered any service for Mr. Garbutt that this $50 was paid you? That is the point that I inquire about.

(Testimony of Russell F. Collins.)

A. Well, I wasn't—I was not considering myself in the position of his employee necessarily. I was more looking after the Mutual Gold and I had no money to go ahead on.

Q. Are you now able to state the date that you were first employed by the defendant Garbutt to render any service in connection with this mining property?

A. I couldn't tell you the exact date; no.

Q. You would not say that it was before or after September 27th?

A. No; I wouldn't. No; I wouldn't.

Q. Could it have been as much as a month earlier?

A. Well, I think not, because I think I was on a contract for myself, hauling supplies to the camp at that time. [141]

Q. At what time? A. At prior to that time.

Q. What time were you hauling supplies before that time?

A. Well, I hauled the pipe, the long 2200 feet of pipe on a contract.

Q. When, when?

A. For the Mutual Gold, and that may be one of the part payments on that. I wouldn't be sure about that. I hauled them—it was in the fall of 1938.

Q. Do you then testify that this $50 payment had connection with the hauling of pipe?

A. I didn't say that.

(Testimony of Russell F. Collins.)

Q. Well, but what do you say?

A. I said I was not sure; that it may be. I remember Mr. Garbutt paid us for hauling this pipe on the contract, and that $50 might be a part of that. I wouldn't be sure.

Q. I show you now another paper—and let me say that these were produced at our request by Mr. Garbutt's attorney—I show you a paper dated November 21, 1938. Please state whether that refreshes your recollection about the hauling of pipe as having occurred long after September 27th.

A. Who signed this? I don't see anything about who signed it. "I gave Mr. Collins $50"——

Q. "55" this refers to.

A. That is what it says "$55 last night on account of the hauling he is doing for us. I got $25 of it from Mr. Garbutt"—— [142]

Q. "From Miss Garbutt."

A. "From Miss Garbutt and the balance was my cash. I have to give her back her $25 and I ought to have about $10 in cash to put in my pocket."

Q. "T. H. E." that would be Mr. Garbutt's——

A. As I remember that now——

Q. No. Just a minute, Mr. Collins. I don't wish to be unfair to you and make you testify to the correctness of some other person's memorandum; but by looking at this memorandum does it refresh your recollection about when you hauled, about when you did the hauling?

(Testimony of Russell F. Collins.)

A. Yes; I am sure that it does. That is in September, about——

Q. This bears date November 21 and calls attention to another check "16,812". I don't know whether that is here or not.

A. That is possible, or that is a part—as I remember, there was no bank open on that day. It was a Sunday and I was to leave town, and I am not sure that that was the second trip to Leevining or the third trip.

Q. I am only interested now in two things, dates and the hauling. Do you still think that the hauling that you did was in September or earlier which may account for the $50 payment to you?

A. I remember very well that I was afraid the snow would come and maybe block the road before we could get this pipe [143] in and up the mountain. I remember that very definitely and I wouldn't positively say whether it was earlier. I remember it was bitterly cold. We slept out one night on the Ridge and it was pretty cold.

Q. Without going into too much detail, I am only interested in who you did that hauling for, whether it was for Mr. Garbutt or whether it was for Mutual?

A. Well, I would say that that was for Mutual Gold.

Q. As late as November, then, you were hauling for Mutual Gold, were you?

(Testimony of Russell F. Collins.)

A. Well, under that set-up; yes.

Q. Under that set-up?

A. That is my understanding; yes.

Q. Who did you have that understanding with?

A. Well, I was acting as a contractor and Mr. Garbutt had ordered the pipe and I took a contract to haul it.

Q. Well, when we find the date Mr. Garbutt ordered the pipe, it was after that you took the contract to haul it, was it, and were you paid for it?

A. Well, I guess it was after he had ordered it I took the contract on it.

Q. You are now shown a yellow sheet, being the third sheet here. Did that ever come to your attention before?

A. Well, that is September 30, 1938.

Q. Did you cause that payroll sheet to be prepared?

A. I don't remember ever having caused it to be prepared; [144] no.

Q. Well, do you identify that as showing money that you received from Mr. Garbutt for services in September?

A. Well, that could easily be. As I say——

Q. Did you receive a check of $19.25 for services in September for five days' work?

A. I don't remember. I might have. It might have been the time——

Q. Anyway, that $19.25 was not embraced in the $50? A. No; I don't think so. No.

(Testimony of Russell F. Collins.)

Q. So, then, is it fair to state that you received two checks from Mr. Garbutt for services, the receipt of which was in September, irrespective of when the services were performed, one September 27th, $50, and one $19.25, paid October 6th, for wages in September?

A. Well, that could easily be; yes.

Q. And are you now prepared to concede that the hauling of the pipe was at a later date?

A. Well, it might have been. As I say, I remember the fear that the winter would close the road on us, and I knew we couldn't operate unless we got that pipe in and laid down. [145]

Q. By Mr. Abel: You are now shown page five of the bill of particulars in this case and your attention is directed to several items, all except the one "miscellaneous expenses $150." Please state whether or not on or about the day or the days shown in the memorandum you received from Mr. Garbutt the amounts specified opposite each date.

Mr. Hinckle: We will stipulate that he did.

Mr. Abel: Yes, thank you. I won't bother you any more.

The Witness: That is all right.

Q. How long were you in the employ of Mr. Garbutt while you recognized him as trustee for Mutual Gold Corporation?

A. Well, I will say from the time I finished the haul and after going to Leevining up until the

(Testimony of Russell F. Collins.)

time the final transfers were made of the Mutual Gold to Log Cabin, and the taking over by the Log Cabin of their interests. That is the [146] time I was—

Q. Do you know what date that was?

A. I don't remember the exact date; no.

Q. At the time you received the check for $50 you were a director of Mutual Gold Corporation, were you not? A. I think I was.

Q. You know it, don't you?

A. Well, yes.

Q. You know you were? A. Yes.

Q. And upon the organization of Log Cabin Mines Company, which was on or about October 18, 1938, you at some later date became director of that company, too, did you not?

A. Yes; that is my recollection of it, sir.

Q. You were a director of the two companies at the same time for a while?

A. I think that is correct.

Q. While you were a director of the two companies and while you were upon Mr. Garbutt's payroll, whether he was trustee or otherwise, the contract of December 17, 1938 was made, was it not?

A. Well, will you bring that out a little more clearly? As I understand it you are referring to this as Mr. Garbutt as trustee?

Q. I do not want to bind you that he was trustee. A. Yes. [147]

(Testimony of Russell F. Collins.)

Q. You brought it up yourself.

A. All right; that is fair.

Q. I merely clarify that slightly.

A. All right; that is correct.

Q. Anyway, you were a director in both companies at the time the December 17, 1938 contract was made.

Mr. Hinckle: I think the minute record shows that, Mr. Abel.

Mr. Abel: Yes; it does show that.

Q. Who negotiated that contract for Mutual Gold Corporation?

A. Which one are you referring to?

Q. The contract of December 17, 1938.

A. December 17, 1938.

Q. Who negotiated it for Mutual Gold Corporation?

A. Well, for Mutual Gold I was very much active, I know, in trying to get the contract signed and agreed upon.

Cross Examination

Q. By Mr. Hinckle: Mr. Collins, was any of this money that was paid to you by Mr. Garbutt paid to you in order to get you to induce the Mutual Gold Corporation to enter into any of these contracts? A. No, sir. [148]

Redirect Examination

Q. By Mr. Abel: Are you still working at this mine? A. Yes, sir.

(Testimony of Russell F. Collins.)

Q. What are you, assistant manager?

A. Me?

Q. Yes.

A. I am clean-up man and a little bit of everything. I do a little bit of everything that comes along. [149]

WILLIAM L. GRILL,

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

A. W. L. Grill.

Direct Examination

Mr. Abel: Mr. Grill is called as an adverse witness also.

Q. Mr. Grill, would you please examine the check of September 29, 1938—and I will hand it to you—in the sum of $150?

A. Yes, sir. I have examined it.

Q. Did you receive that check on or about the day it bears date from Mr. Garbutt?

A. Possibly the same date, I believe.

Q. On or about the same date?

A. I believe so. I am not positive. That time goes by and I would not swear about the date.

Mr. Abel: I offer the check in evidence. May I detach it?

(Testimony of William L. Grill.)

Mr. Hinckle: Surely.

Mr. Abel: The check for $150 bearing date of September 29, 1938, issued to Wm. L. Grill, signed "Frank A. Garbutt", No. 16,669.

The Clerk: Exhibit 73.

Q. By Mr. Abel: Is that the same disbursement that is entered up in the bill of particulars under date of September 20, 1938, "miscellaneous expenses, $150"? [150]

A. I don't know. I did not make up the bill of particulars, so I can't tell you.

Mr. Abel: Will you get the exhibit to the Garbutt deposition?

Mr. Hinckle: Mr. Abel, we will stipulate it is item No. 2 in your tabulation on page five of your bill of particulars.

Mr. Abel: Yes. The date seems to be incorrect, but we obtained that from you.

Mr. Hinckle: That is the only item.

Mr. Abel: And the only point I wanted to emphasize about it is that it does not purport to have been issued to Mr. Grill but to "miscellaneous expense." That is the only point. On the books it did not show issued to Mr. Grill.

Mr. Hinckle: I assume that is true, Mr. Abel. I don't know about that. If you say that is true, all right. Did you examine the books?

Mr. Abel: When we get to the exhibits to the Garbutt deposition we will check it. That will be all, Mr. Grill.

(Testimony of William L. Grill.)

The Court: Do you want to cross examine yourself?

The Witness: I would like to explain what the check is. It seems to me that is rather important.

The Court: You may make any explanation you want.

The Witness: This check was expenses of a trip to Los Angeles, advanced by Mr. Garbutt for and on behalf of the Mutual Gold Corporation. It is my recollection that that was paid at the time or about the time that I came down here, when [151] Mr. Vance and Mr. Abel—there was a session here at that time of about two or three days and I was called down in an effort or in a conference to settle the various disputes between Mr. Vance and the Mutual Gold and Mr. Garbutt. It might have been later, but that is my recollection of the time. And it was no payment by Mr. Garbutt for any service of any kind or character whatsoever.

Mr. Abel: Are you through, Mr. Grill?

The Witness: Yes.

Q. By Mr. Abel: Isn't this the sequence of events: That the meeting of the stockholders to ratify the contract of September 2nd was called for Spokane for September 24th; that on the 18th or 19th, before that, it was called off by the Board; that on the 24th the objecting stockholders met in Spokane and came right down here and were here on the morning of the 26th and you arrived on the morning of the 27th?

(Testimony of William L. Grill.)

A. You were here a day before, I think. I flew down and got here.

Q. Yes. You flew down on the night of the 26th.

A. Yes. I don't remember the dates, except I think that is the check and it calls it somewhat to my recollection. [152]

RUSSELL F. COLLINS,

recalled as a witness in behalf of the plaintiffs, having been previously duly sworn, testified as follows:

Further Direct Examination

Q. By Mr. Abel: Did you have anything to do with what I will call the "termination contract" of October 31st, or what we will call the "interim contract" of November 1, 1938?

A. Do you mean the termination?

Q. Yes; the termination of the one contract and the making of another one?

A. Nothing whatever, sir.

Q. You did not have anything to do with that?

A. No, sir.

Q. Did you have occasion during that time to come to Los Angeles from Leevining?

A. I would not be sure as to the dates, but I remember several trips that I have made from Los Angeles, probably that one, too, I think along that time.

(Testimony of Russell F. Collins.)

Q. I call your attention to an expense account-totaling some $128.05, under date of October 25th. Is that your signature? Did you prepare that expense account?

A. What year is this, Mr. Abel?

Q. That same year, October, 1938. Is that your signature to that expense account? [153]

A. Oh, yes; that is my signature. Yes; that is my signature.

Q. By Mr. Abel: Well, who other than you during the months of September or October, 1938, was representing Mutual Gold Corporation in Los Angeles, authorized to incur expenses to be paid at the request of Mr. Garbutt?

A. There is no evidence we were incurring any expenses authorized to be paid by Mr. Garbutt.

Q. I am now referring to the $150 paid to Mr. Grill. A. Yes.

Q. Who sent for him? You were present at that meeting?

A. I think I wired for him. That is my recollection, that I wired for him.

Q. You wired for him?

A. That is my recollection; yes.

Q. Did you do that after conference with Mr. Garbutt?

A. No. I don't know that it was before or after. [154]

A. R. CARTER,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. A. R. Carter.

Direct Examination

Q. By Mr. Abel: What relation do you bear to Frank A. Garbutt, one of the defendants here?

A. I don't bear any relation to him.

Q. Business relation?

A. Business relation — I keep his accounts and do various work around the office.

Q. You are employed in the office, are you?

A. I am; yes.

Q. And about the Log Cabin Mines Company, have you always kept its books of entry and account also?

A. Well, since we took the books into our office.

Q. And when was that?

A. About the first of April, 1939.

Q. Have you the account of disbursements made to Russell F. Collins during the period from September 1st to February 28, 1939?

A. September 1, '38, September 1, '38. Why, that was before the inception of Log Cabin Mines. I don't have an account with Russell Collins. It is just contained in the regular account of the checks as written during that period. [157]

(Testimony of A. R. Carter.)

Q. Whose checks?

A. These checks here were signed by Frank A. Garbutt.

Q. Upon his personal account?

A. Upon his personal account; yes.

Q. Would you please let me see the ledger account?

A. Well, that is a transcript of the ledger account up to the time that the Log Cabin Mines started to take over. This is the Log Cabin Mines. That is an exact copy from the ledger account.

Q. Where is the ledger account itself?

A. I didn't bring that along because the paper that was given to me said to bring the papers of the Log Cabin Mines Company, and I brought all the books of the Log Cabin Mines and I also brought this in case you wanted to ask some questions about it.

Q. But you can't produce the ledger accounts?

A. Oh, I can produce the sheets. They will be exactly the same as that, no difference whatsoever, dates and everything given there. There are some checks in there to Russell Collins.

Q. I think we shall want to see the origin of the account and how it was carried from the start.

A. Well, that is just the way it was carried from the start. That is the exact copy. You have seen the sheets with those same things on down in our office about a year ago.

(Testimony of A. R. Carter.)

Q. The item on the second sheet here "miscellaneous [158] expense"—

A. It is written "William L. Grill."

Q. I noticed the name "William L. Grill" has been written in? A. That is right.

Q. The entry upon the book did not show that, did it?

A. It showed "William L. Grill" but didn't show the "miscellaneous." These here were made up at one time. I didn't go back and copy these over the second time. They were made up for another purpose at a different time, the complete transcript of the ledger account. But every item is itemized there and wherever it says "miscellaneous" the "miscellaneous" is cut down and distributed.

Q. When Mr. Garbutt testified in the Spokane case by deposition you produced the original ledger accounts, did you not?

A. Was that the time that you was down there in the office?

Q. Yes. And then you made a transcript of it?

A. Yes. Yes; you looked at the ledger at that time, if that is the time you were in the office.

Q. And at that time the name "William L. Grill" did not appear?

A. Yes; it appeared on the ledger and you took note of it right there that it did.

Q. How do you explain that it shows it on September 20th? [159]

(Testimony of A. R. Carter.)

A. September 20th?

Q. Yes.

A. That is the day the check was given.

Q. The check is in evidence and purports to be September 27 or 29—September 29.

A. September 29?

Q. Well, that is a clerical error?

A. It probably is a clerical error, because you see here is one of the 27th right before it, you see in the typewriting.

Q. Yes. A. That should be "29."

Q. For what period of time did Frank A. Garbutt issue his personal checks on this property involved in this case?

A. You mean in payment of the bills of the mine, the Log Cabin Mines Company?

Q. Or any bills at all to directors of Mutual or anybody?

A. Well, they were from September 21st to about March—or, no—April 5th or 6th of 1939. Then is when the Log Cabin Mines bank account was opened.

Q. What date was that?

A. Well, let's see. The book here is better than anything else. The first check was issued on April 17th; that was No. 1; and the deposit was made on April 15th, the first deposit of $1,000.

Q. And the remaining $9,000 was when? [160]

A. The 17th, April 17th.

Q. That paid the capital stock of Log Cabin Mines Company, that $10,000, didn't it?

(Testimony of A. R. Carter.)

A. I don't know, as far as that is concerned. I think it did, but I wouldn't say for certain because I didn't handle that phase of it.

Q. Will you have the payroll showing when Mr. Garbutt started to employ labor at that mine?

A. Well, I have the dates of it; yes. I don't have the actual payrolls with me.

Q. Not the date of the check, but the date the employment commenced. To refresh your recollection—withdrawing that question for the moment. Do you personally know that Garbutt operated this mine in some capacity from the time he originally took hold up until April 15, 1939?

A. Well, no; I don't.

Q. By the Court: Were you in his employ at that time?

A. Yes; but part of the time it was operated under the name of "Frank A. Garbutt", and a short time later it was operated under the name of "Mutual Gold Corporation." That is just the way that we turned in the statements to the Federal Government for the compensation insurance.

Q. By Mr. Abel: Then you can produce a ledger account in the morning, the original ledger account, of both those accounts, can you?

A. Well, the account was all carried in one account on [161] the books or ledger sheet in the books under "Frank A. Garbutt".

Q. Under the name "Frank A. Garbutt"?

A. Yes; the ledger sheet was, but the account

(Testimony of A. R. Carter.)

was called the "Mutual Gold Corporation" after a certain time.

Q. Upon the books of Mr. Garbutt, then, you say that there was one account a part of the time that was in his name on the same sheet and as a part of the same account?

A. It was always in the name in the book as the "Mutual Gold Corporation"; but, as I say, we operated at one time under his name, and as far as the tax statements were concerned, and then it was taken over by the Mutual Gold operation. [162]

The Witness: Do you want these other books here, too? These are the books, do you want those, too?

Mr. Abel: Well, we might look at those now. Let me see what is shown in this one.

Q. May we use this?

A. These books start after those were complete, after those.

Q. Show me the book. Would you turn to the account here involved?

A. Which account is that?

Q. This Log Cabin account.

A. It is all Log Cabin, the whole ledger is.

Q. The whole ledger is the Log Cabin account?

A. Yes.

Q. Commencing what date?

A. Well, let's see. Of course, that is not probably the first starting dates, but that account probably was started afterwards. There wouldn't be anything in it to start it with. It starts April 1st,

(Testimony of A. R. Carter.)

Stock. Those back there are just blanks. There is nothing in that.

Q. Were you familiar with the organization of Log Cabin Mines Company?

A. Well, in regard to what? [163]

Q. In regard to its incorporation?

A. No; I was not.

Q. Were you an officer?

A. No—well, I might have been for a day or two or something of that sort.

Q. For what purpose?

A. Well, at the time that they incorporated, I believe I was a director for probably, oh, it might have been a week or something of that sort.

Q. At whose request?

A. Well, at the request of Mr. Hinckle, the attorney.

Q. And how did you come to sever that relationship?

A. Well, somebody else was—I don't know who was, but somebody else was put in as a director, a permanent director. My understanding was that I was only asked to act as director a few days, temporarily.

Q. Who told you that?

A. Why, nobody told me that. I just was under the impression that that was the case.

Q. What is shown on Sheet 1, this sheet?

A. That is an account for Russell Collins, money advanced to him and money paid back.

(Testimony of A. R. Carter.)

Q. What is the first item?

A. It is a check for $100.

Q. Under date of February 5, 1940?

A. February 5, 1940; that is right. [164]

Q. And the total amounts of the checks issued to him to February, 1940—

A. Was $359, of which he paid back $98.

Q. Still indebted for the balance?

A. For $261; that is right.

Q. That is Log Cabin Mines?

A. That is right.

Q. Have you any other accounts with any of the former directors of Mutual Gold?

A. No; that is all.

Q. He is the only one, is he? A. Yes.

Q. And he ceased to be a director, didn't he, of Mutual Gold, or you don't know?

A. I don't know that. [165]

Cross Examination

Q. By Mr. Hinckle: Mr. Carter, in keeping the books that you have before you do you take instructions from anyone as to just how you shall handle the account?

Q. By Mr. Hinckle: By that I mean, Mr. Carter, does Mr. Garbutt or does anybody come to you and say, "Charge this to the Mutual Gold" or "Charge this to John Smith," or just how much discretion do you use yourself in working out these accounts.

(Testimony of A. R. Carter.)

A. Well, as the usual thing, why, somebody tells me to what account it is to be charged or the accounts are O. K.'ed and it is written on there "Log Cabin Mines." [167]

R. P. WOODWORTH,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. R. P. Woodworth, W-o-o-d-w-o-r-t-h.

Direct Examination

Q. By Mr. Abel: Your residence?

A. Spokane.

Q. Your profession? A. Lawyer.

Q. By the Court: Your residence is where?

A. Spokane.

Q. By Mr. Abel: You are an attorney-at-law?

A. Yes, sir.

Q. Were you connected with Mutual Gold Corporation during the year 1938 for a time?

A. Yes.

Q. And you had been a director for some time previous, had you? A. Several years.

Q. Were you present at the directors' meeting held at the Vance Hotel, Seattle, on August 13,

(Testimony of R. P. Woodworth.)

1938, being the date that the Cecil B. De Mille proposal came before the board?

A. Yes, sir; I was there at that meeting. [168]

Q. By Mr. Abel: I call attention, Mr. Woodworth, to the minutes of that date, and ask you to tell what the [170] proposed offer was which is referred to therein, quoting:

> "Considerable discussion was had in regard to this matter and Mr. Lloyd J. Vance stated that he had a proposition which he would like to submit to the Board if they would consider it, and after some discussion the proposed offer was read by the Board, Mr. Vance explaining at the time of the reading thereof as to the changes he desired made."

State whether or not that was a renewal of the previous offer.

Mr. Moore: What is the date of that, may I inquire?

Mr. Abel: August 13th, one week later.

A. Yes; that was a renewal of the offer, and, as I recall that, he had agreed to make some changes, some concessions which had been requested by some members of the board. I think we went over that contract very carefully at that meeting. That is my recollection.

Q. Do you remember as to whether or not at that meeting—I read again:

> "It appearing that the majority of the Board was not willing to enter into a contract with

(Testimony of R. P. Woodworth.)

Mr. Lloyd J. Vance of any kind, and on request of Mr. Ferbert that the meeting be adjourned until Tuesday, August 16, 1938, at 10:00 o'clock A. M., at the Vance Hotel, Seattle, Washington, in order that a representative from Mr. Cecil B. De Mille might be at the meeting [171] to explain and clarify the proposition which he was presenting to the meeting, * * * the meeting was adjourned * * *"

A. I think that is a correct statement of what happened.

Q. Were you present at the directors meeting one week later, or three days later, August 16th?

A. I think I was. It is my recollection that that is the time that Keily came up.

Q. Quoting from the minutes:

"Further discussion was had on the offers of Mr. Vance and Mr. Cecil De Mille."

And the meeting adjourned.

A. Yes; I was present.

Q. State whether or not you were present at the meeting on August 27, 1938?

A. I think I was. I was present at most of those meetings. The minutes show that.

Q. That you were present?

A. That I was present, though they got my name spelled wrong.

Q. State whether or not at that meeting the notice of forfeiture of contract, rescission of the contract— A. No; I see—

(Testimony of R. P. Woodworth.)

Q. —was up for consideration, that bearing date August 25, 1938?

A. It bears August 27th. [172]

Q. But the rescission bearing date—no; it is two days later. Was it at that meeting with that pending termination of the contract that the Garbutt deal was agreed to?

A. Yes. In fact, that was one of the inducements.

Q. Do you know how the Garbutt proposal first came to the attention of the board of directors?

A. Yes, sir.

Q. On what date and under what circumstances?

A. It came August 6, '38 at the board meeting prior to the stockholders meeting of that date.

Q. And who communicated the matter?

A. Mr. Ferbert, I believe, principally, and Mr. Collins, Russell Collins.

Q. As to whether or not they had come up from California to the Spokane meeting?

A. Yes; they had.

Q. And what did either of those gentlemen say in connection with Mr. Garbutt and in connection with the Lloyd J. Vance matter? [173]

A. They stated that Mr. Garbutt was willing to make a much better deal than the one that was being submitted to the board at that time.

Q. By Mr. Abel: By Lloyd J. Vance?

A. Yes, sir.

(Testimony of R. P. Woodworth.)

Q. By the Court: How did you vote on the contract?

A. I voted against it at all the board meetings.

Q. At all the board meetings A. Yes.

Q. By Mr. Abel: Up to that time had the board unanimously favored the Lloyd J. Vance proposal?

A. Well, all members that were present had, but it was not unanimous. Mr. Collins and Mr. Ferbert learned at the meeting that the Vance proposal was adopted.

Q. And during the interim between the 6th of August and the 15th of August do you know where Ferbert and Collins went from Spokane?

A. I understood they came to California to see Mr. Garbutt.

Q. And came back with the De Mille proposal on the 13th? A. That is correct.

Mr. Abel: That is all.

Cross Examination

Q. By Mr. Hinckle: Mr. Woodworth, were you a stockholder in the corporation on August 6, 1938, Mutual Gold? [174] A. I was. Yes; I was.

Q. Did you vote in favor of the resolution which was adopted at that meeting authorizing the board of directors to deal with the property as they saw fit, or to that effect?

A. I voted for that resolution that was adopted at that meeting because of the representations that were made at the meeting and prior to it.

(Testimony of R. P. Woodworth.)

Q. I could not hear you.

A. I voted for the resolution which was adopted at that meeting because of representations which were made at the meeting and prior to the meeting.

Mr. Hinckle: I did not ask you that. I move to have that stricken, your Honor. It is not responsive to the question.

The Court: Yes; it will be stricken. And answer the question: Did you vote for the resolution?

A. I did.

Mr. Hinckle: That is all.

Redirect Examination

Q. By Mr. Abel: What, if any, representations were made at that meeting?

A. Well, the representations that I have just testified to, that there would be a much better deal made than the one which had been presented by Lloyd J. Vance; and the directors at the meeting prior thereto and at the meeting [175] afterward all agreed that that was what would be done, that they would accept a better proposition.

Mr. Abel: This is a new matter.

Q. Were you present at a meeting of the board of directors held at the Vance Hotel on or about the 18th of August, when Mr. Grill phoned to Mr. Garbutt about whether he would accept a payment of the contract in full?

A. I don't—I remember something about that, but I don't recall it was at that date. It was about that time.

(Testimony of R. P. Woodworth.)

Q. It was after a directors meeting, was it?

A. I understood it was.

Q. What was the communication?

A. I was not present when it happened, but I understood that——

Q. Well, never mind then. A transaction took place after the notice of rescission, did it, whatever it was? A. Yes.

Q. Which was the 25th of August. Did that come before the board of directors in your presence?

A. It came up at that meeting. It came upon that day.

Q. What was the message communicated by Mr. Grill as coming from Mr. Garbutt?

A. Well, as I recall, that was with regard to the payment that was due. I think there was something that was behind in the payment or some talk about whether or not he would accept the full amount of the balance due. [176]

Q. On the contract of purchase?

A. On the contract, on the purchase contract.

Q. What was the information communicated by Mr. Garbutt?

A. My recollection is that he would not even accept the full amount. He was claiming a default, and that even if the full amount of the balance of the purchase price was paid he would not take it. It was something like that. I don't remember clearly, but that is my recollection. [177]

M. F. HALEY,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name? Will you state your name, please?

A. M. F. Haley.

Direct Examination

Q. Did you enter the service of Frank A. Garbutt during the fall of 1938 upon the mining property involved in this case?

A. Yes, sir; on the 10th.

Q. On what date did you enter his service at that mining property?

A. The 10th day of September.

Q. The 10th day of September?

A. Yes, sir.

Q. Of 1938? A. Yes, sir. [178]

Q. When was the service terminated?

A. The 24th day of May, '39.

Q. 1939? A. Yes, sir.

Q. During that period from the 10th day of September, '38 until the 24th of May, 1939 in what form were you paid your wages?

A. By check.

Q. Whose check?

A. Well, I think all of them was practically Mr. Garbutt's, and every one of them was Mr. Garbutt's, but they might have had some different kind

(Testimony of M. F. Haley.)

of a form on them. But that is my remembrance, as far as that goes, signed by Frank A. Garbutt. [179]

J. R. STURGEON,

called as a witness on behalf of plaintiffs, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. J. R. Sturgeon.

Direct Examination

Q. Did you ever work at this mine involved in this case? A. Yes, sir.

Q. When, if at all, did you enter the service of Frank A. Garbutt in connection with working at that mine? A. September 26th, '38.

Q. September 26, 1938? A. Yes, sir.

Q. How long did you work, until when?

A. Until the 11th of April, '39.

Q. And during that time state whether or not you had charge of the underground operations?

A. I did.

Q. How were you paid your wages? [180]

A. By checks.

Q. Whose check? A. Mr. Garbutt's.

Q. Throughout the whole period?

A. Yes, sir.

(Testimony of J. R. Sturgeon.)

PLAINTIFFS' EXHIBIT 78

is set forth in the Complaint, as Exhibit 3 thereto, at page 42. [181]

Mr. Anderson: That will be 78. I offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Leevining, California, dated September 7, 1937 (1938), the subject matter of which is an inquiry——

Mr. Abel: 1938.

Mr. Anderson: I beg pardon. September 7, 1938 is the date of the letter. The subject matter is——

The Court: Read it. It is only four lines.

Mr. Anderson (reading): "I have learned from the North Star Mine at Grass Valley that The American Manganese Steel Co., Oakland Pier, make them exceptionally good shoes and dies. Will you kindly give me exact dimensions so I can ask for quotations."

The Clerk: Exhibit 79.

Mr. Anderson: That will be Plaintiffs' Exhibit 79. I offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Log Cabin Mine, Leevining, California, dated September 17, 1938. The subject matter is the status of the mine in general, but it is introduced for the purpose particularly of the "P. S." which is typed just below Mr. Garbutt's

(Testimony of J. R. Sturgeon.)

signature with the initials "F. A. G.", and reads as follows:

> "P. S. This delay will not affect you and you will kindly proceed with the work you now have in hand as rapidly as possible."

The Clerk: 80. [185]

Mr. Anderson: That is Plaintiffs' Exhibit 80. I now offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Leevining, California, dated September 19, 1938, which reads as follows:

> "I have not had time to analyze your list of supplies and material necessary to operate to May 1st. I hope to be able to get over this during the day.
>
> "None of the engineering or supply houses would guarantee successful operation from an elevation of more than about 35 feet. Pumping the sand is probably out as there does not appear to be any other way of doing it, from a 35 foot elevation."

The Clerk: That is Exhibit 81.

Mr. Anderson: Which letter is Plaintiffs' Exhibit 81. I offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Log Cabin Mine, Leevining, California, dated September 20, 1938, the subject matter of which is operations at the mine, and I will read the last paragraph thereof:

> "After going through your list of supplies and proposed changes in the mill I decided we

(Testimony of J. R. Sturgeon.)

could save both time and money if you come here for a conference, therefore wired you accordingly."

The Clerk: 82.

Mr. Anderson: Which letter is Plaintiffs' Exhibit 82. I now offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Log Cabin Mine, Leevining, California, dated [186] October 22, 1938, which is as follows:

"I am enclosing an order herewith which please read, sign and return the original, keeping the copy for your files."

The Court: What is the date of that?

Mr. Anderson: The date of that is October 22, 1938. I introduce the enclosure as part of the exhibit.

The Clerk: Exhibit 83.

(Testimony of J. R. Sturgeon.)

PLAINTIFFS' EXHIBIT 83

FRANK A. GARBUTT
Suite 712—411 West Seventh Street
Los Angeles, California

Oct. 22, 1938.

Mr. M. F. Haley,
Log Cabin Mine,
Leevining, Cal.

Dear Mr. Haley:

I am enclosing an order herewith which please read, sign and return the original, keeping the copy for your files.

Sincerely,
FRANK A. GARBUTT

FAG-C.

TELEGRAM

Los Angeles, California,
October 31, 1938. 11:36 AM

J. R. Sturgeon,
Leevining, Calif.

Kindly sign and have Mr. Haley sign acknowledgment of order October twenty second and send to me by return mail.

FRANK A. GARBUTT.

(Received by telephone from Bishop 6:00 PM 10-31-38.

(Testimony of J. R. Sturgeon.)

Oct. 22, 1938.

Mr. M. F. Haley,
Log Cabin Mine,
Leevining, Cal.

Dear Mr. Haley:

If we build a pipe line from the drain tunnel to the lower end of the flume a serious situation may arise, and this is especially true if this pipe line is eighteen inches or such a matter in diameter.

If any large volume of water gets into this line that is more than will be readily absorbed at the lower end of the flume, it might break away and damage Mrs. Cunningham.

To avoid any chance whatever of this happening, I hereby issue the following order:

ORDER

At no time shall any water or tailings be run into this pipe line which extends from the drain tunnel to the lower end of the flume unless and until a written order is obtained from this office, signed by the undersigned, Frank A. Garbutt.

This order applies to any and all tailings now on the hillside or that may hereafter be deposited there by anyone whomsoever.

It also applies to any run off water from rains or melting snow.

It also applies to any tailings made or produced at the mill hereafter.

(Testimony of J. R. Sturgeon.)

The only water that may be run into this pipe line is mine water, from the drain tunnel when run into this pipe line at the tunnel mouth when introduced in such a way that no tailings or other water can enter the pipe line either at this or any other point on the pipe line.

Kindly see to it that this order is promulgated to anyone who may have occasion to be near this line even though they may have no authority in the premises.

FRANK A. GARBUTT

I have read the above order this.....day of....., 1938, and I understand it and will be governed thereby.

.....

Mr. Anderson: That is Plaintiffs' Exhibit 83. I now offer in evidence a letter from Frank A. Garbutt to M. F. Haley, Log Cabin Mine, Leevining, California, dated November 19, 1938, which I believe I should read as soon as the clerk marks it.

The Court: What is the import of it?

Mr. Anderson: It has to do with not having heard from Haley for some time, asking him to write at least twice a week, and finally——

The Court: May I ask if the purpose of these letters is to show Garbutt's activity in connection with the mine?

(Testimony of J. R. Sturgeon.)

Mr. Anderson: Yes. I think he was giving orders to Haley, asking him to come for conferences and the like during the period this correspondence covers.

Mr. Abel: The continuity of the activities despite these various contracts changing the status.

Mr. Anderson: It states that Mr. Collins has requested that he be taken off the pay roll, etc. [187]

Mr. Abel: The matter on the back of the sheet is not offered.

Mr. Anderson: There is certain writing on the back which is disclaimed as part of the exhibit.

The Court: Put a pencil through it so I will not be concerned in trying to read it.

The Clerk: Exhibit 84. [188]

PLAINTIFFS' EXHIBIT 84

FRANK A. GARBUTT
Suite 712—411 West Seventh Street
Los Angeles, California

Nov. 19, 1938.

Mr. M. F. Haley,
Log Cabin Mine,
Leevining, Cal.

Dear Mr. Haley:

I haven't heard from you for some time. I would like to have letters at least twice a week and oftener

(Testimony of J. R. Sturgeon.)

if you can find time, telling me what you are working at, and what you have done, and what remains to be done, together with your opinions, conclusions, etc. This will be very helpful and I will respond in kind where possible.

For your information, Mr. Collins has requested that he be taken off the payroll and, therefore, he is no longer in the Mutual's employ. The hauling work he is doing is on his own account and he is being paid under contract.

He has authority from the Mutual, I believe, to try to herd the hillside tailings into the flume or into the pipe line when it is built provided they start to move. Before this time arrives, I would like to have your comment upon the effect that will or may have at the lower end of the flume.

Yours sincerely,

FRANK A. GARBUTT.

FAG-C.

A. R. CARTER,

recalled as a witness on behalf of plaintiffs, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. For the moment, did you prepare Exhibit 85? [193]

A. Yes; but I don't remember what at that time. Yes; I prepared it originally.

(Testimony of A. R. Carter.)

Q. Did you prepare it from the ledger?

A. Yes.

Q. How did you come to omit Mr. Grill's name in the statement and give "Miscellaneous expense $150" under date of September?

A. Well, I have done that with other items, too.

Q. No. But why did you do it in this instance? Was it to hide from us the fact that it was paid to Mr. Grill?

A. No. At the same time that you took the deposition I showed you the ledger sheet here with Mr. Grill's name on it.

Q. You did?

A. Oh, yes. You looked right over my shoulder and I pointed it out to you in Mr. Garbutt's office. [194]

Q. Would you now turn to the journal entry of October 20, 1938 with reference to the expense of incorporation—"Incorporation Expense Log Cabin Mines Co."?

A. Let's see; you said "October 20th". It was a $36.38 amount?

Q. Yes. A. Here it is right here.

Q. What is the entry there?

A. "Check to D. E. Hinckle, attorney, incorporation expense 36.38."

Q. And under date of November 2, 1938: "Filing Permit to sell stock, Log Cabin Mines Co. $10"?

A. "David E. Hinckle" right here, "Filing Permit to sell stock $10." [195]

(Testimony of A. R. Carter.)

Q. Can you by reference to the original ledger account show any item of expense charged in the original ledger under date of September 2, 1938? [196]

A. No. That item that you are pointing to there has nothing to do with the Mutual Gold. That was charged to Mr. Garbutt's personal expense. This account was put onto the same sheet as that account. That was his own personal expense account.

Q. But it shows that on September 2, 1938 Mr. Garbutt made a trip to the mine?

A. All right, and he paid his own expenses.

Q. Yes. But the point is he made a trip to the mine on September 2, 1938, according to his records.

A. That was the time the entry was made there and the check given for it. I presume it was about that time, that is, the time the check was given. The time that he went to the mine I couldn't say definitely, with the exception that was probably near that time.

Q. This entire transaction, then, dating from September 2nd or from August 29th——

A. It dates from August 17, 1932.

Q. Has that any relation to this case?

A. Well, I don't think so, as far as that is concerned.

Q. No. the account is "Log Cabin Mines—Mutual Gold Corporation," is it?

A. That is right.

(Testimony of A. R. Carter.)

Q. That is how it is carried in the ledger. And outside of the item in 1932, the next item is August 29, 1938, "Telegrams to Seattle 24.98"? [197]

A. That is what it says there; yes. That is the item.

Q. And the next item is under date of August 15: "M. J. Keily ticket to Seattle 69.35"?

A. That is the entry; yes.

Q. And next is September 2, "F. A. G. exp trip to Mine 80.00"?

A. None of those items were charged to Mutual Gold, though; all personal expense of Mr. Garbutt's. [198]

Q. By Mr. Abel: Mr. Carter, have you the mint returns from this mine during the period in controversy here?

A. (Witness producing papers.)

Q. Are these all of them?

A. I presume so. They were what we took out of the file. I just have them in my file.

Q. So far as you know, they are complete?

A. So far as I know, they are.

Q. That is the net amount received from the mint for the ore? That is right, isn't it?

A. That is right; that is the number of ounces of gold received and the fineness of the gold. [199]

Q. By Mr. Abel: Can you give the total?

A. There is $6,132.02 in 1939 in two items. The balance of 1939 is $75,357.81; and in 1940 there is $189,256.32; and in 1941 there is $6,220.77.

(Testimony of A. R. Carter.)

Q. Commencing what period and ending what period do these figures apply to?

A. The first check for a shipment was received on March 23, 1939. The last check was received on March 12, 1941.

Q. But covering the mint returns for what period?

A. For the period between those dates.

Q. I am now referring not to the date of the check of the mint returns, but, as it were, the date of production from the mine itself?

A. That I couldn't tell you. [200]

Q. By Mr. Abel: Mr. Carter, can you furnish us with a breakdown of the item found on Exhibit 85, sheet 4, being the December, 1938, advances, the last item, reading: "Miscellaneous Expenses $365.45"?

A. Three and one-half months' office service at the Los Angeles office at $100 per month, $350; two books on mining, 15.45.

Q. Where is that?

A. It is written right there.

Q. It is not on the exhibit itself?

A. Not on that paper; no.

Q. I now direct your attention to sheet 3 of the same exhibit, Exhibit 85, the item under date of November 30: "Miscellaneous Expense $250" Would you break that down for us?

A. "W. L. Grill traveling expense $150; D. E. Hinckle, attorney's fees $100."

(Testimony of A. R. Carter.)

Q. That is not the $150 that was previously paid to Mr. Grill?

A. Naturally it is not. It is a different date entirely.

Q. Let us see the journal entry of that item.

[202]

A. Here is one: "D. E. Hinckle attorney's fees $100." That is $100. See it?

Q. By Mr. Abel: I am interested in the W. L. Grill item.

A. I thought you asked for both of them. Here it is right here "William L. Grill, attorney, traveling expense $150."

Q. Under what date is the journal entry?

A. Under the date of November 2nd.

Q. Have you any other items reported in the exhibit as "Miscellaneous expense"?

A. I think probably there is.

Q. Which covers money paid to Mr. Grill?

A. No; but I have other items as "Miscellaneous expense."

Q. Yes. Well, I am interested in the——[203]

A. Franchise tax.

Q. Why was it not disclosed in the exhibit that it was a payment to Mr. Grill?

The Court: I think that has been asked and answered.

Mr. Abel: This is a previous one, your Honor, the $150. There is another payment to Mr. Grill of $100.

(Testimony of A. R. Carter.)

A. Why, because that we put certain things under "Miscellaneous expense," taxes, attorneys' fees, and so forth. We have other items besides attorneys' fees and payments to Mr. Grill under "Miscellaneous expense."

Q. Let me see the journal entry for December 31st of $365.45.

A. What did you say the date was, December 31st?

Q. December 31st "Miscellaneous expenses $365.45."

A. That is a journal entry which I don't think I have that, with the exception of on that sheet there.

Q. Well, let us have the journal entry.

A. It is not on this one here.

Q. Let us have the journal for——

A. This is the cash journal. This here is a cash journal. There is one or two items there. That was a charge from the journal.

Q. A charge but not an actual disbursement at the time?

A. No, no; it is not a disbursement. It is just simply a charge for those services at that time and there was no check drawn for it, never spent. [204]

Q. The $365, then, is principally a charge for the use of Mr. Garbutt's office?

A. For the work that we do there in our office, the stenographer, myself and other people, for the

(Testimony of A. R. Carter.)

Mutual Gold Corporation. There was no check ever issued for it. It has never been paid. [205]

Q. By Mr. Abel: The miscellaneous expense that you [206] have reference to under date of December 31, 1938, was for services rendered in connection with this mining property?

A. That is what it was.

Q. Whether it was operated for Mutual Gold, or operated for Mr. Garbutt, or operated for Log Cabin?

A. Yes. We did a lot of office work there for it.

Q. But there was no segregation of the account or the charge?

A. What do you mean "segregation"?

Q. Any segregation between the books of Mr. Garbutt.

A. What do you mean "segregation"? I don't understand that.

Q. Well, any separation of charges for the particular service for one or the other?

A. If it had been charged up by our office for all the time those people put in there, the charge would have been about four times as much as this

Q. The point is whether they were all run together in the books.

A. What do you mean run together?

Q. By the Court: Did you make separate charges against Mr. Garbutt, Log Cabin or Mutual? Did you segregate the [207] account?

A. We just charged up $100 a month was all.

(Testimony of A. R. Carter.)

Q. Right straight through?

A. Right straight through; never charged more or never charged less. [208]

RUSSELL F. COLLINS,

recalled as a witness on behalf of defendants, having been previously duly sworn, was examined and testfied as follows:

Direct Examination [221]

Q. By Mr. Hinckle: In 1938, Mr. Collins, was the mine in operation?

A. The mine was closed down on April 22nd, 1938, under Mr. Vance and operated by Mr. Keily.

Q. After the bills and expenses were paid was there [225] enough money left from the treasury of the Mutual Gold or available to Mutual Gold to pay the obligations which plaintiffs have set up as then existing, some, I believe, $60,000—something like $60,000, I think? The exact amount is not material. A. No, sir; I am sure there was not. [226]

Mr. Abel: Your Honor, I could make an admission here that would shorten this up entirely. The company had this property which it considered quite valuable. The recovery from this old mill was not sufficient to——

(Testimony of Russell F. Collins.)

The Court: Well, they had what they called a pilot mill there which was not sufficient, it was not operating efficiently.

Mr. Abel: They could not recover the values and they could not pile up operating capital or a cash reserve. The mine quit, or the mill quit, and the mine, too, for that matter—were shut down in April of 1938 and until the transaction complained of the directors met from time to time to consider how to raise the money. It did not have funds to carry on. Its creditors were not pressing. Its creditors were $30,000 of production notes, of which the Vances owned a majority, which were payable out of production. The balance of its accounts was principally J. A. Vance, who had loaned some $18,000 and who was not pressing; Mr. Stiegler and Mr. Ferbert, the one, I believe, with $3,000 and the other with $2,000, who were not pressing. The mine was not in pressing need of money to pay its bills, but it was in need of money if it was to build a new mill or to operate its old mill; and it was [229] under those circumstances that the meeting of July 18, I believe the date was, was held.

The Court: Well, it did not have the money to make the payment on its contract.

Mr. Abel: They did not have the money to make the payment. [230]

Q. By Mr. Hinckle: Mr. Collins, did you have anything [231] to do with obtaining the contract of September the 2nd from Mr. Garbutt?

(Testimony of Russell F. Collins.)

A. Yes, sir. September 2nd?

Q. September 2nd, 1938. A. Yes.

Q. What did you have to do with that?

A. Well, I solicited his cooperation.

Mr. Abel: What? I didn't get it.

The Court: He solicited his cooperation.

Q. By Mr. Hinckle: Where did you solicit his cooperation?

A. In Los Angeles, in his office.

Q. Did you come down here to see him?

A. Yes.

Q. Did you come down especially to see him about that?

A. Concerning our difficulties and how to get out of them.

Q. Did he ask you to come down?

A. Beg pardon?

Q. Did he ask you to come down?

A. So, sir.

Q. When you came down what did you say to him—briefly, now?

A. That we were not satisfied with the offer of the Vances and we would like to have someone that would finance our undertakings. [232]

Q. Did anybody come with you?

A. Mr.— I am not sure whether Mr. Keily was here or whether he came with me. One trip I know he came with me and went back, when we solicited.

Q. You made more than one trip, did you?

A. Yes.

(Testimony of Russell F. Collins.)

Q. Did Mr. Garbutt agree right away when you first broached the matter to him to jump in and lend the money or help you out?

A. He did not.

Q. What did he say that would give you any clue to his attitude?

A. That he did not want to be tangled up with it; that, as I recall his statement, "At my age I don't want to undertake the beginning of a mining proposition."

Q. Did you drop it then? A. I did not.

Q. What did you do?

A. Well, Mr. Garbutt sort of put us off by saying, "I will give you entree to some friends of mine and maybe they will finance you."

Q. Did he give you that entree?

A. He did.

Q. Who was the friend?

A. Well, one of them was Cecil De Mille, and Mr. Keily, I think—in fact, I know—approached Hal Roach concerning [233] the financing of our undertaking.

Q. Did you make a deal with either one of those?

A. No, sir.

Q. By Mr. Hinckle: Why did you want to make the deal with Mr. Garbutt?

A. Well, considering everything and from every angle, and considering our difficulties, I considered Mr. Garbutt was the most competent person and capable, that is, financially able to carry it through.

(Testimony of Russell F. Collins.)

Q. Were you a director at that time of the Mutual Gold? A. Yes; I was.

Q. Why did you prefer to deal with Mr. Garbutt rather than to deal with Mr. Vance in that capacity? [234]

A. Well, we had tried Mr. Vance as general manager of the property and I considered his success a failure. [235]

Q. By Mr. Hinckle: You remember, do you, Mr. Collins, when notice of forfeiture was given to Mutual Gold Corporation on or about August 25, 1938? A. Yes, sir; I know of it.

Q. By Mr. Hinckle: Did that notice of forfeiture influence you in any way to make a contract with Mr. Garbutt [236] or to favor, rather, a contract with Mr. Garbutt? A. No, sir.

Q. The forfeiture was withdrawn on or about October the 25th, 1938. I am telling you that.

A. As I recall it.

Q. Did that forfeiture which had been withdrawn, notice of forfeiture which had been withdrawn, on or about October the 15th, 1938, influence you in any way toward favoring the contract later made with Mr. Garbutt on December the 17th, 1938?

A. No, sir.

Q. Did Mr. Garbutt ever at any time say anything to you which you considered an attempt to coerce you into making or favoring the making of the contract with him? A. No, sir. [237]

(Testimony of Russell F. Collins.)

Direct Examination

Q. By Mr. Grill: Mr. Collins, you stated that you were not satisfied with the success of Mr. Vance's failure. Will you state just what you meant by that?

A. Well, to begin with, Mr. Vance was a lumber man and did not understand the operation of a mine and insisted——

Q. How was that evidenced?

A. Well, by the fact that he wanted to dismiss Mr. Keily and said to let him go, and various, various things that came up from time to time.

Q. During what period was that?

A. Well, along '37, '38.

Q. During the period of Mr. Vance's management contract? [238]

A. Under the contract; yes.

Q. State any other matters in connection with his management that influenced you in this connection?

A. Well, one was, he wanted to syphon the water out of a shaft as the means of getting the water out of the shaft, that we could go on down with it. [239]

Cross Examination [241]

Q. Anyway, the amount of stock that you had in Mutual was a few thousand shares at the time of this transaction, wasn't it?

A. You mean in the Mutual Gold?

Q. Yes; in the Mutual Gold.

(Testimony of Russell F. Collins.)

A. Yes, sir. [242]

Q. Soon after August 6th you came down to visit Mr. Garbutt? A. Yes; I may have.

Q. You drove from Spokane to Los Angeles to visit him? A. I think that is true.

Q. Had you talked to him before that as to his making a deal?

A. Prior to that time Mr. Garbutt repeatedly insisted that he would not be dragged into the financing of the property.

Q. Then it was at an earlier date than August 6th that you discussed with him his coming into the picture?

A. Well, he was approached, I know.

Q. Who approached him?

A. Well, I think Mr. Keily, and I also was at the meeting; but he absolutely refused to have anything to do with it. [245]

Q. Anyway, you were the one who negotiated this contract with Mr. Garbutt, were you not?

A. You mean the original?

Q. The contract of September 2nd.

A. Well, I had to do with it, I know. I was interested in it; yes, sir.

Q. Who else negotiated it?

A. Well, I think Mr. Ferbert was with me.

Q. Anybody else?

A. And I don't remember whether Mr. Grill was here at the time or not. I don't believe that he was.

Q. The first contract of September 2nd was

(Testimony of Russell F. Collins.)

negotiated while the rescission of the contract was insisted upon, was it not? [247]

A. The original might have been at that time, I am not sure.

Q. Well, don't you know that it was?

A. I don't remember the exact dates. I wouldn't say for sure. Maybe it was.

Q. There had been nothing said up to that time, had there, about organizing a corporation under the laws of another state?

A. Well, it had been hashed over.

Q. When?

A. In Seattle. Mr. Vance, Lloyd Vance was to organize a new company and take over the property and was to operate it.

Q. To take over half of the assets, was it not, not all of them? [248]

A. No; half of the ore, as I remember their contract, and that we were to have the other half and the new company was to do all the mining and treating, and the old company had nothing to do with it.

Q. You say that was at the Seattle meeting?

A. Well, it was in the various meetings we had at Seattle.

Q. The Seattle meetings, the first of them was August 13th, was it not?

A. Well, there was preliminary discussions before the meeting, I know that.

Q. Then you came down August 6th to see Mr. Garbutt. When did you see him?

(Testimony of Russell F. Collins.)

A. Oh, I saw him from day to day. I don't know just the exact dates but I saw him very nearly every day.

Q. You returned to Seattle so as to be back there on the 13th, didn't you?

A. Well, of course, when I was in Seattle I didn't see him.

Q. Then, when did you next see him after the 13th? A. Well, I came down here after that.

Q. When did you first know that the notice of forfeiture of August 25th was to be put out, was to be issued?

A. I didn't know that until it was issued.

Q. What?

A. I knew nothing of it until it was issued.

[249]

Q. And you did not try to get it relieved, did you?

A. Well, I was hopeful that something could be done to relieve it.

Q. Did you go to see the owners about it?

A. I saw Mrs. Ryan from time to time.

Q. Did you complain to the owners that it was not fair for their agent to be insisting on forfeiture, and, at the same time that he was getting an assignment of the contract?

A. Well, we were between a threat from Vance, and, if you will permit it, the question was: We had a payment coming due in a few months and we had nothing with which to meet it.

(Testimony of Russell F. Collins.)

Q. And Vance threatened that he would not put it up? A. Yes; he said he wouldn't put it up.

Q. That was his threat?

A. Yes; that was his threat.

The Court: In other words, one was forfeiting and the other was refusing to put up any more money; they were both in the same fix, weren't they?

Mr. Abel: Well, hardly, hardly, your Honor.

The Court: Both were putting on the squeeze.

The Witness: That is it. [250]

Q. Anyway, why was the contract of September 22nd made?

A. Well, because we thought it was the best thing we could do under the circumstances for the Mutual Gold and their stockholders. [251]

Redirect Examination

Q. By Mr. Hinckle: Mr. Collins, you gave one, or two or three reasons—I don't remember how many—why you preferred to deal with Mr. Garbutt rather than Mr. Vance. Is there any other reason that you know of? A. Well, yes.

Q. Well, what was that reason?

A. Mr. Vance's general attitude towards the small stockholders of the corporation.

Q. I mean do you know of any specific thing that indicated that? A. Yes; I do.

Q. What was it, anything he said, or something he did or what?

(Testimony of Russell F. Collins.)

A. After we had practically——

Q. No. Was it something he said, or something he did [253] or what?

A. Well, something he said.

Q. Where was it said?

A. It was said at just south and east of the present site of the new mill, near the pipe line that was being built from the upper tank, or the big tank, down to the mill, the old mill.

Q. What was said at that time? No. Who was there?

Mr. Abel: We object unless we know the time.

Mr. Hinckle: Yes.

Q. Who was there at the time?

A. Just Mr. Vance and myself.

Q. About when was that?

A. As I recall, it was in the fall, about October probably, or November of 1937.

Q. What was said?

A. The question was raised—Mr. Vance said, "To hell with the little stockholders. They have no business being in here." [254]

J. E. STIEGLER,

called as a witness on behalf of defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. J. E. Stiegler.

(Testimony of J. E. Stiegler.)

Direct Examination

Q. By Mr. Hinckle: Mr. Stiegler, what office, if any, do you hold with the Mutual Gold Corporation?

A. President.

Q. How long have you been the president?

A. Beginning in June—no. Wait a minute. I was first a director in June, I think, '34, and that fall, I believe, about October of '34.

Q. Are you a director also? A. Yes, sir.

Q. How long have you been a director?

A. Since June, '34.

Q. Are you a promoter of mines that go broke or do you have some other occupation?

A. I am a farmer.

Q. Are you a stockholder also?

A. In Mutual Gold; yes.

Q. About how much stock do you hold?

A. Oh, I think the family has, that is, my wife and daughters and myself, about 100,000 shares, I believe, [266] something like that.

Q. Does the Mutual Gold owe you any money that you have advanced? A. Yes.

Q. About how much?

A. Oh, it is near $4,000, I think, that I have advanced.

Q. What was that for?

A. $3,000 of that was advanced in '37, the fall of '37. Mr. Vance wrote me a letter and wanted me

(Testimony of J. E. Stiegler.)

to talk with the directors and try to raise $6,000, I believe it was, and I put up $3,000 at that time.

Q. Did you favor dealing with Mr. Garbutt rather than Mr. Vance in the making of this contract of September 2, 1938? A. I did.

Q. Why?

A. Well, at the time, or while we were—the Lloyd Vance proposition was up, it seemed like there was a lot depended on how much money I could raise from my Yakima friends. On several occasions Lloyd Vance asked me if I couldn't guarantee $30,000, and then a time or two he asked if I couldn't—I told him I couldn't guarantee anything but I would do the best I could; and a few days before coming down to try and make some deal with Mr. Garbutt—that was in, I think, the latter part of August, '38 or the 1st of September—I received a letter from Mr. [267] Woodworth stating that——

Mr. Abel: Objected to as not the best evidence and ask for the production of the letter.

Mr. Hinckle: Just pass that up. Go ahead and tell in your own words why you preferred dealing with Mr. Garbutt.

A. Well, Mr. Vance had had his chance. He had spent $30,000—$50,000 besides what had been taken out down there, and what I had heard about Mr. Garbutt, he had had considerable mining experience, had been successful, and he also had the finances

(Testimony of J. E. Stiegler.)

to equip the mine properly and that was the big consideration, I thought.

Q. Did you come down to Los Angeles to see Mr. Garbutt? A. Yes, sir.

Q. Did he ask you to come down?

A. No; I don't think he did.

Q. Where did you talk with him?

A. At his office.

Q. Anybody else there?

A. Yes; Mr. Grill, Mr. Russell Collins and Mr. Ferbert, I believe.

Q. Did he ever ask you to make a deal with Mutual—to help him make a deal with Mutual?

A. No.

Mr. Anderson: May I inquire of counsel if he is now eliciting what transpired at this meeting in Mr. Garbutt's office? If so, we would like to know the date. You have [268] said that certain parties were present and now you ask him did he ever do——

The Court: He gave the date the latter part of August, he thought, as near as he could figure.

A. We were down here three days and I believe the contract was signed on the 2nd day of September.

Q. By the Court: You are speaking of the time that the contract was executed as of September the 2nd? A. Yes, sir.

Q. By Mr. Hinckle: Did you urge this upon Mr. Garbutt or did he urge it upon you?

(Testimony of J. E. Stiegler.)

A. Well, he tried——

Mr. Anderson: If your Honor please, that is a conclusion. I think he should detail what was said by each of the parties at this conference.

The Court: Yes; that is correct.

Q. By Mr. Hinckle: Well, what did you say to Mr. Garbutt, if anything, about making a contract with the Mutual?

A. I don't remember so much what I said to him, but I remember once he stated that he didn't know whether he would go through with this contract or not, but if he didn't he would arrange so that we could pay the sellers on the 1st of November when the $10,000 became due, and we were quite anxious to——

The Court: No what you were anxious. What was said. [269] About your anxiety, that is a conclusion. What was said?

A. Well, he told us that he would furnish us the $10,000 and also a payment on installing the high-power line up to the mine. It was to cost $10,000. I think he said he would furnish part of the money, or something of that kind.

Q. How did you happen to come down?

A. I came down because Mr. Ferbert and Mr. Collins thought we could make some deal.

Q. They asked you to come down, did they?

A. It was talked in the board meeting and the whole board was invited to come down.

(Testimony of J. E. Stiegler.)

Q. Did you ever communicate, yourself, with Mr. Garbutt? A. No, sir.

Q. Had he ever communicated to you?

A. Before that time?

Q. Yes.

A. No; I am sure he didn't. I am quite sure that he didn't.

Q. When was the first time you ever met Mr. Garbutt?

A. Was here on the last day of August or the 1st of September.

Q. The only information you had about the deal was the information you got from Mr. Ferbert and Mr. Collins?

A. And Mr. Keily. Or more—

Q. Keily? [270]

A. Keily, I think the name is, that was superintendent at the mine.

Q. Was he up north with you?

A. I met him in Seattle.

Q. What was the purpose of coming down?

A. To try and make some—get Mr. Garbutt to take over the operation of the mine.

Q. By Mr. Hinckle: Was anything ever said to you or in your presence at any time by Mr. Garbutt or by anyone in his behalf which you construe to be an attempt to force you into making or attempting to have made a contract?

A. With Mr. Garbutt?

Q. With Mr. Garbutt for the Mutual?

(Testimony of J. E. Stiegler.)

A. No. [271]

Q. Did you ever have any interest in this matter excepting to protect your investment?

A. And to protect the stockholders.

Q. Well, that was your investment? [272]

A. Yes, sir.

Q. You are a stockholder? A. Yes, sir.

Q. Did you have any arrangement whereby you were to receive any outside interests or profits of any kind?

A. No, sir. I might state that I have always stood my own expenses to the mine and to I don't know how many board meetings in Spokane and Seattle, and this trip down here and the trip down here on September 2nd, '38 I stood my own expenses, never handed them in to the company even.

Q. Did you have anything to gain by favoring either the Vance contract or the Garbutt contract, except what you thought was the best interests of the stockholders and yourself as a stockholder?

A. No, sir.

Q. Is this your first mining experience?

A. No. I started out when I was a kid in Alaska. I was up there about 20 years, or 18 years, and it has been in my blood ever since I guess. I have tried to settle down to just farming but I do break loose once in a while.

Q. By Mr. Hinckle: Did you know that Mr. Garbutt paid Mr. Grill's expenses down here on one occasion? A. Yes.

(Testimony of J. E. Stiegler.)

Q. One or two occasions, whatever it was?

A. Yes.

Q. Were you influenced in any way to favor a contract [273] with Mr. Garbutt by the fact that a notice of forfeiture had been given on August 25, 1938 and withdrawn then on October the 15th, 1938?

A. No; I don't think so. However, that note, I was quite concerned over it at the time that we had received it. I think Mr. Abel is the first that told me about it.

Q. Have you ever received any money from Mr. Garbutt for services you rendered him any any way?

A. He bought me a malted milk yesterday, I think. That is all.

Q. That is the first you have received?

A. I believe so. No; he treated me to dinner once before.

Cross Examination [274]

Q. By Mr. Abel: I am now reading from Plaintiffs' Exhibit 16, being a letter dated September 12, 1938, signed by you as president, a letter to the stockholders of the company. That letter called for another meeting to ratify the Garbutt contract of Septmber 2nd? A. Yes, sir.

Q. And in that letter, quoting from that letter:

"A board meeting was held on the 7th day of September, at which the action of the president of the company was ratified and the contract approved by the board, subject to its rati-

(Testimony of J. E. Stiegler.)

fication by the stockholders of the company. The board members voting in favor of the ratification were Mr. Ferbert, Mr. Hickcox, Mr. Grill and Mr. Stiegler. Those voting against were Mr. Woodwoorth and Mr. Vance. The writer was advised that the contract was approved by Mr. Collins, the one director absent. It was the feeling of the writer, as well as the other members of the board voting in favor of the contract, that if it was not accepted the company would become involved in long and expensive [275] litigation with the owners of the property over the attempted cancellation of the contract."

Do you, in the light of that statement, wish to modify what you have testified on that subject when it was within a few days of the action taken?

A. Well, I said I was concerned over the notice of forfeiture when we first got it.

Q. Do you stand by the statements contained in Exhibit 16, or do you now modify them by your testimony?

A. I think I would have to—I will tell you, these letters, I had help in writing out these letters by our attorneys, either Mr. Grill or Mr. Weller helped me in writing out these letters. Now the question you are asking is what?

Q. Is whether you stand by the statement contained in the letter as to what motivated you in the signing of the contract, 10 or 12 days earlier,

(Testimony of J. E. Stiegler.)

this letter being dated the 12th and the contract being dated on the 2nd?

A. Well, I was concerned, of course, about the notice; yes.

The Court: You have not answered the question yet.

Q. By Mr. Abel: I am not asking you whether you were concerned about the notice.

A. The question is what, then, please?

Q. The question is whether you stand by the statements [276] contained in the letter of the 12th instant.

A. What paragraph is that that you are referring to?

Q. I will just mark the paragraph, Exhibit 16.

A. Well, I signed it. I guess I must have approved it.

Q. The question is not whether you signed it. You signed it knowingly, did you not?

A. I read it over first; yes.

Q. After legal advice?

A. Yes; I read it over.

Q. From possibly two attorneys, Mr. Weller, the company attorney of Spokane, and Mr. Grill?

A. I am not sure which one helped with this letter, but I usually was helped by either one or the other.

Q. But the letter was constructed advisedly, with knowledge of its contents, was it not?

A. I presume so.

(Testimony of J. E. Stiegler.)

Q. And the purpose of the letter was to intimate to the stockholders that if the contract was not approved by them litigation would result with the owners, isn't that true? A. Probably; yes.

Q. Did you know that on the very day that the contract was signed with Mr. Garbutt in his office he issued a letter to the Vance Lumber Company—to the Mutual Gold Corporation and J. A. Vance, general manager, being Exhibit 12, insisting upon the forfeiture on the same day? [277]

The Court: Answer the question.

A. If I knew whether this was written? I just don't recall. I believe that—I don't recall. Perhaps I did know that at the time. I don't remember now.

The Court: May I see that exhibit when you are through with it?

Mr. Abel: Yes, your Honor.

The Court: You may proceed.

Q. By Mr. Abel: Your attention is now directed to Plaintiffs' Exhibit 28, being a letter signed by "Chandis Securities Company" and "Alice Clark Ryan" of date October 3, 1938, particularly to the last page of it which I will now read:

> "We are not satisfied with the way you have evaded carrying out your contract with us nor pleased with your Managing Director, Mr. Vance's uncandid statement to us that 'you have complied with your contract in every particular', when you well know this is not true and, in view of the many concessions we have

(Testimony of J. E. Stiegler.)

made you in the past we are not pleased by your concealment from us of developments at the mine; nor by the excuse of your manager's attorney that you had no contractual obligation to inform us; nor by his contention that our failure to take action sooner, constituted a waiver of the many breaches of your contract, and we are not at all reassured by your internal dissensions, nor by the [278] threats of litigation amongst yourselves which it appears have been extended to covertly include us.

"As long as this is possible or threatened, you may expect no consideration from us."

Then another quote:

"We consider your former contract terminated and at an end."

Were you aware of that letter?

A. Was that letter sent to me or to Mutual Gold Corporation?

Q. To Mutual Gold Corporation, under date of October 2nd (3rd).

A. I perhaps knew of it at the time but I don't recall it now.

Q. You don't recall it? A. No, I don't.

The Court: May I see it, please?

Mr. Abel: It is on the last page, the particular part.

Q. You are now shown the letter of August 25, 1938, being the cancellation notice of that date.

(Testimony of J. E. Stiegler.)

A. What date?

Q. Exhibit 11.

A. I don't know whether I have seen this before or not. I don't believe those letters were sent to me. I live over there in Naches. The home office is in Spokane.

Q. At that 27th of August, that meeting of the board of [279] directors at the Vance Hotel, was not that letter, Exhibit 11——

A. It might have been. I don't know.

Q. —exhibited, read and thoroughly discussed?

A. That or some other one. I remember of some discussion over it; yes.

Q. The letter of forfeiture of August 25th?

A. What date would that be?

Q. Two days later. A. Two days later.

Q. On the 27th of August?

A. It is very likely I did.

Q. Your attention is directed again to Exhibit 11, particularly the second part of it, and you are asked to state what, if anything, was done in the way of negotiation to reinstate the contract before the assignment to Garbutt of the contract itself on the 22nd or 21st day of September, 1938?

A. What had been done to——

Q. What, if anything, did you or did the board do to get the contract reinstated between those days, other than to make the sell-out to Mr. Garbutt? A. I don't remember.

(Testimony of J. E. Stiegler.)

Q. Isn't it true that there was nothing done?

A. These notices were directed to Mr. Vance as general manager, and I think that you answered those letters your- [280] self, Mr. Abel.

Q. And when they came to your attention, when this notice of August 25, 1938, Exhibit 11, came to your attention you, as president of the company, did nothing?

A. You was taking the matter up yourself, I think. You replied for Mr. Vance, as I remember.

Q. The question is whether you, as president of Mutual Gold—— A. No; I didn't.

Q. —took action of any kind?

A. No; I didn't because you was taking care of that. [281]

PLAINTIFFS' EXHIBIT 90

* * * * * * *

MINUTES OF ANNUAL MEETING OF STOCKHOLDERS OF MUTUAL GOLD CORPORATION.

February 1, 1939

The stockholders of the Mutual Gold Corporation met in regular annual session at the office of the Company, 401 Fernwell Building in the City of Spokane, State of Washington, on Wednesday the 1st day of February A. D., 1939 at the hour of 11:00 o'clock A. M. pursuant to call and notice.

The meeting was called to order by President

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

J. E. Stiegler who asked Vice President E. D. Weller to preside, Secretary E. Fuson acting as recording officer.

The Chair appointed Mr. C. T. Orr, Mr. R. P. Woodworth and Mr. E. D. Weller as proxy committee to check and report on the proxies.

The office of the company being inadequate to accomodate the stockholders, the meeting, on motion duly made, seconded and carried was adjourned to be reconvened at the office of the Company in the Assembly Room of the Old National Bank Building, Spokane, Washington at the hour of 2:00 o'clock P. M.

The meeting reconvened at 2:00 o'clock P. M. in the Assembly Room of the Old National Bank Building, Spokane, Washington pursuant to adjournment, the same officers being in the chair.

Roll Call showed the following results:

Present in Person	164,114 shares
Present by proper proxy	2,149,342 shares
Total shares present and entitled to vote	2,313,456 shares
Total shares outstanding	2,641,182 shares

The proxy committee reported that the proxies were in regular form in the amounts as above stated, and upon motion duly made, seconded and carried, the report of the proxy committee was accepted and approved.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

The Secretary presented a copy of the Notice of the Annual Meeting pursuant to which the meeting was held with affidavit of mailing notice to each and all stockholders of record more than 10 days prior to the date fixed for the meeting as provided by the by-laws of the company. The same being in regular form and there being no objections thereto, the Chair declared the meeting was regularly and duly called and open for business.

The Minutes of the last meeting of the stockholders held August 6, 1938 were read and on motion duly made, seconded and carried, were approved as read.

The Chair then announced the next order of business was the reports of officers of the company. Mrs. E. Fuson, Treasurer made a report of Mr. Garbutt's expenditures in behalf of the Mutual Gold Corporation for a period from September 31, 1938 to January 16, 1939 inclusive, showing a total expenditure of $50,130.97.

Mr. Abel requested a balance sheet and was informed that a financial statement later than the Trial Balance prepared as of September 30, 1938 was not available at this time.

Mr. Grill read telegrams from Mr. Garbutt and Russell Collins indicating that every effort was being made to advance the interests of the stockholders of Mutual Gold stock.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

There was some discussion from the floor, principally by Mr. Abel addressed to Mr. Grill, in regard to the status of the Mutual Gold Corporation. After the discussion was becoming rather lengthy the chair stated the meeting was now open for nomination of seven directors to serve until the next annual meeting of the stockholders and until the election and qualification of their successors.

Mr. Grill nominated J. E. Stiegler, G. H. Ferbert, Tom L. Wyckoff, F. T. Hickcox and W. L. Grill, said nominations being seconded by C. T. Orr. Mr. Abel nominated Mr. Lloyd J. Vance and R. P. Woodworth, said nominations being seconded by A. P. Bateham.

Mr. Woodworth nominated Clarence Colby and Mr. Hurd nominated Mr. Joe Vance, however, both nominations were withdrawn.

There being no further nominations, Dr. I. S. Collins moved that the nominations be closed. Said motion was duly seconded and unanimously carried.

On motion duly made, seconded and carried, the Secretary was instructed to cast the unanimous ballot of all shares present and entitled to vote for the directors so nominated, and the Secretary thereupon cast 2,313,456 votes for the said directors. The Chair thereupon declared that J. E. Stiegler, G. H. Ferbert, Tom L. Wyckoff, F. T. Hickcox, W. L. Grill, Lloyd J. Vance and R. P. Woodworth were

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

duly elected as directors to serve until the next annual meeting of the stockholders and the election and qualification of their successors.

A motion was then made by Dr. R. A. Munro that a complete report of the conditions of the Mutual Gold Corporation be furnished individually to each stockholder and that same be made as soon as possible after this meeting and mailed to each one.

Mr. Grill then stated that the company was short of funds to cover the cost of having such a report compiled, printed and mailed out, whereupon Dr. Munro added to his motion "as soon as funds are available". Said motion was duly seconded.

Mr. Abel then moved an amendment to the motion that there be also supplied a balance sheet which shall show the assets and liabilities of the company and the income and expenditures for the past year. Said motion as amended was duly seconded, voted upon and carried.

Mr. Orr then made a motion that a vote of thanks be given to the directors for what they had done during the past year and that the stockholders let them know they are behind them and ratify their actions in the past year. The motion was duly seconded after which there was considerable discussion. A standing vote was then taken and a majority of those present in person voted against said motion.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

Mr. Grill then made the following resolution and moved its adoption:

"Whereas, on Saturday, the 17th day of December, 1938, the board of directors of this company, at a special meeting called and held at said time, authorized and directed the President and Secretary of this corporation to execute a contract for and on behalf of this company with Frank A. Garbutt and to deliver said contract to said Frank A. Garbutt, which said contract relates to the equipment, operation and handling of the company's property near Mono Lake, California, all as more fully set forth in said contract; and

"Whereas, the said contract has now been fully executed by all of the parties thereto and delivery thereof made by the respective parties; and

"Whereas, the stockholders of this company at a meeting held on or about the 6th day of August, 1938, duly authorized and directed the board of directors to deal with said property as provided by a resolution passed at said meeting; and

"Whereas, the board of directors has reported the execution of said contract to this meeting; and

"Whereas, it is for the best interests of

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

said company that said contract be ratified, approved and confirmed; now, therefore,

"Be It Resolved, that the action of the board of directors in authorizing the execution of said contract with the said Frank A. Garbutt and the execution and delivery thereof by the President and Secretary of this company and the said contract be and the same is hereby ratified, approved and confirmed; and

"Be It Further Resolved that the board of directors of this company be and it is hereby authorized and directed to cancel, renew and alter said contract with the said Frank A. Garbutt as from time to time in its discretion it shall deem necessary or advisable for the best interests of the corporation."

Said motion was seconded by Mr. C. T. Orr after which there followed considerable discussion. A vote was then taken by calling the roll with the following results:

Name	Shares voting FOR	Shares voting AGAINST
J. E. Stiegler	1,447,009⅓	
J. A. Vance		11,134
C. H. Colby		13,067
F. Z. Hurd (gone)		
Tom Wyckoff	5,700	
George Barner		2,399⅓
W. H. Abel		5,000
R. P. Woodworth		83,116⅓
Lloyd Vance		447,781

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

E. D. Weller	6,260	
A. P. Bateham		184,756
Fielding McClaine		25,233
Dr. Abrams (gone)		
J. W. Maxwell		60,000
O. C. Moore (voted under protest)		8,667
Total shares voting	1,458,969⅓	841,153⅔

There being no further business, Mr. Grill made a motion to adjourn, said motion being duly seconded, voted upon and carried.

E. D. WELLER,
Vice President and Chairman.

E. FUSON,
Secretary & Recording Officer.

February 1, 1939

The Committee finds that there are present in person and qualified to vote at this meeting;

In Person 164,114
By Proper Proxy 2,149,342

Making a total number of shares present and qualified to vote of 2,313,456, out of an outstanding number of 2,641,182 shares.

Respectfully submitted,
Proxy Committee
R. P. WOODWORTH
C. T. ORR
E. D. WELLER

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

AFFIDAVIT OF SERVICE OF NOTICE OF ANNUAL STOCKHOLDERS' MEETING of MUTUAL GOLD CORPORATION.

State of Washington,
County of Spokane—ss.

E. Fuson, being first duly sworn on oath, deposes and says that at all times herein stated and included, she was and now is above the age of 21 years and Secretary of the Mutual Gold Corporation, and as such officer, on the 20th day of January, 1939, a copy of the attached notice of meeting, copy of attached letter of J. E. Stiegler, President, dated January 14, 1939, copy of attached 'Progress Report' of Frank A. Garbutt dated January 8, 1939 and a copy of the attached proxy, properly enclosed and directed, with postage prepaid, was by her mailed to each stockholder of record of such corporation at his address as shown by the books of the company.

E. FUSON,
Secretary.

Subscribed and sworn to before me this 25 day of January, 1939.

E. D. WELLER,
Notary Public in and for the State of Washington, residing at Spokane.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

PROXY

Know All Men by these Presents: That I, the undersigned, do hereby constitute and appoint J. E. Stiegler or in the event of his inability to act, F. T. Hickcox or W. L. Grill, my true and lawful attorney to represent me at the annual meeting of the stockholders of Mutual Gold Corporation to be held on the first day of February, 1939, at eleven o'clock A. M. at the office of the company at 401 Fernwell Building, Spokane, Washington, and do hereby authorize and empower him to vote at said meeting and at any adjournment thereof for me and in my name and stead upon the stock then standing in my name on the books of said company, and I hereby grant my said attorney all the powers that I should possess if personally present at said meeting hereby revoking all former proxies by me made.

Witness my signature this.....day of January, 1939.

.....

Witnessed By:

.....

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS of MUTUAL GOLD CORPORATION.

Notice Is Hereby Given that the annual meeting of the stockholders of Mutual Gold Corporation will be held at the office of the company at 401 Fernwell Building, Spokane, Washington, on February 1st, 1939, at eleven o'clock A. M. in accordance with the by laws of said corporation for the purpose of electing a board of directors for said corporation for the ensuing year, for hearing the reports of officers of said corporation and for the transacting of any other business that may properly come before said meeting.

MUTUAL GOLD CORPORATION,
By E. FUSON,
Secretary.

MUTUAL GOLD CORPORATION
401 Fernwell Building
Spokane, Washington

January 14, 1939

To the Stockholders of Mutual Gold Corporation:

You will find enclosed herewith notice of Annual Meeting of the stockholders of the company, to be held on the date fixed by the by-laws.

You will also find enclosed herewith latest progress report of Mr. Frank A. Garbutt. You will

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

note from this that Mr. Garbutt has expended $50,253.87, up to January 8, all of which expenditures were necessary before the property could be put in operation.

The drain tunnel to the sink and the installation of the tailings line were necessary to keep the water and the tailings out of the creek which runs through Mrs. Cunningham's property. An effort was made by Mr. Garbutt to make a satisfactory arrangement with Mrs. Cunningham to use the creek for water and tailings disposal, but without success. During a period of prior management a disposal line from the mouth of the drain tunnel to the sink was constructed at a considerable expense, but it was not properly constructed, thus necessitating a new installation. The new installation is now constructed at a proper grade and should cause no further trouble to the company.

The mine was ready to commence operations several days ago, but at the last minute it was found that the water pipe leading to the property was frozen at some point and the getting of this line in operation occasioned some delay. However, the mill began operating on January 12, 1939.

Mr. Garbutt has kept the directors fully informed of what is transpiring at the property, and has outlined to them from time to time for their approval the work which he is undertaking. This

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

is something which has never occurred before. Mr. Garbutt is also making a study of the ore and the property, so as to determine the proper equipment for obtaining the best recoveries from the ore. He is doing this in a very thorough manner and I have no doubt that when he finally recommends what equipment should be placed upon the property for this purpose, it will be successful.

It has been a real pleasure to the writer, and I feel also to the board, to have a man in charge of the operation who not only knows what he is doing, but who does not hesitate to do it when he finds out what should be done. Mr. Garbutt realizes better than anyone else that the property will have to have the most economical kind of operation to be successful, and you may rest assured that it will have just that kind of operation. He was severely handicapped owing to the shortness of time which he had to attempt to get the property in operation this year. I may also frankly say in this connection that I doubt very much if we could have found another person in the United States as well qualified in every respect to handle this property.

As you are doubtless aware, a number of months this year were lost, during which the board was considering the offer of the Vance interests and the one made by Mr. Garbutt. After long delay and much opposition, the board finally concluded that

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

it would be for the best interests of all the stockholders to accept Mr. Garbutt's offer, which was reduced to a contract. This contract was more than lived up to by Mr. Garbutt. For various reasons, however, he desired to terminate the contract and a new one has been prepared which has met the approval of the board but has not yet been executed and delivered to the company by Mr. Garbutt. We should have some word on it before the stockholders' meeting.

The company has a serious controversy with Mr. Vance. When the deal with Mr. Garbutt was closed, Mr. Vance insisted upon the immediate payment of the production notes, as well as certain advances which he claims to have made on the company's behalf. Of course it was impossible to make any immediate settlement. He later modified his demands and insisted upon said advances being repaid within one year and the production notes at a later date. No settlement could be made along this line until the company knew when it might have sufficient resources to take care of any settlement which it might make. If such a settlement were made and the company unable to meet the obligations when they fell due, then the interests of the stockholders would be completely wiped out, and this is what the directors are desirous of avoiding. Whenever Mr. Vance is willing to make an arrangement which

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

will not jeopardize the interests of the stockholders, the present board of directors will meet him more than half way.

You will find enclosed herewith a proxy, which is self-explanatory. If you desire to continue the present management of the company's affairs and the present board, which has and will work for the best interests of all of the stockholders, kindly sign the enclosed proxy and return to the office of the company. If, on the other hand, you feel that the present board has not worked unselfishly and for your best interests, do not hesitate to vote for anyone you desire, because we are all working for one end, and that is to make the property and the company a success.

You may be informed prior to the stockholder's meeting that many things may occur detrimental to your interests because of the arrangement made with Mr. Garbutt. In this connection please bear in mind that certain statements were made to some of you at the time the contract was first entered into as to what would happen if the contract was made. Certainly none of these things has happened and you are now in a position to judge performance against any assertions of what may occur in the future.

It is the writer's personal opinion, in conclusion, that the stockholders will be highly satisfied with

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

Mr. Garbutt's operation during the coming year and that they may expect a fair and square deal from him.

Yours sincerely,

MUTUAL GOLD CORPORATION,

By J. E. STIEGLER,
President.

FRANK A. GARBUTT
Suite 712 - 411 West Seventh Street
Los Angeles, Cal.

January 8, 1939.

To the Board of Directors,
Mutual Gold Corporation,
Mr. J. E. Stiegler, President.

PROGRESS REPORT

My last report was made to you November 22, 1938. Since then, however, your Board of Directors has been kept in close touch with all operations by means of daily air mail letters to your President at Naches; your director, Mr. Grill, at Seattle; and your Director, Mr. Ferbert, at Long Beach, together with copies of much of the routine correspondence involved.

Director Russell Collins has kept in close touch by personal contact, so that your Board has been

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

fully informed at all times and has been consulted in advance of any work contemplated and their advice sought and carefully considered.

I feel, and I think you agree, that your Board of Directors are functioning one hundred per cent in controlling and conducting your Company's affairs, being enabled to do so intelligently by the completeness and promptness with which all information reaches them.

It pleases me to state that the Company's business as far as I can see, is gradually getting into a better and sounder condition and, although there are innumerable things to do to protect your titles and develop your property that they are being given proper attention as expeditiously as opportunity affords.

Among other things referred to are:

Your Relationship With The Owners. Although you made your last payment promptly you are still in default as to many material things, some of which, as, for example, failure to impound your tailings can not be corrected. While not waiving these various defaults the owners have shown a disposition to be lenient and, although I can not guarantee it, am hopeful that we will have no serious trouble with such matters, this particular one being dependent upon what damage may occur to parties owning property below us.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

Titles To Your Holdings. It is important that some of your claims should be patented without further delays. This is being studied. It is to some extent dependent upon the weather as survey by the U. S. Deputy Surveyors are amongst the necessary steps. There are also some matters of policy to be considered.

The title to your water is going to be questioned and the legalities involved are being carefully examined into. We have obtained copies of the briefs from the attorneys who tried some of the City's cases who were my attorneys for over twenty years and the law and the facts are being briefed for our protection.

Road Development. For twenty-five years the operators of this property, including ourselves, have been wasting money in hauling over and attempting to maintain impossible roads and prohibitive grades.

I am not discussing here the developing of the Mine itself nor the planning of a proper process nor the building of a suitable mill. These subjects are too complicated to be determined finally with our present knowledge.

As you know, they are being studied intensively and work is being expedited as rapidly as business prudence and good judgment will permit. You are completely familiar with all of the considerations governing this but it is appropriate to say that I

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

am not displeased with the progress made with our metallurgical and physical problems.

Before a study of these matters can be completed it will be necessary to operate the property and ascertain a great many things not now known in order to secure the best approximate results both in operation and in initial expenditure. This work is receiving my best attention as you are completely aware. We have tied ourselves to no one engineering firm but are consulting the best technical and operating skill in the United States and in the final analysis will be governed by our own knowledge and not by any individual opinion for, while our operations are small, they are vital to us and we can not afford to take any chances.

Now as to details to date:

1. Our power line, as previously reported, is complete, as is also another power line 1,500 feet long, with butt-treated poles to serve the four pumps for our tailing disposal line.

2. A transformer of our own for electric lighting and a lighting system have been installed to replace the inadequate and expensive contraption we had.

3. We have completed the installation of a tailings line about 2,600 feet long to the Federal Site and built a dam there; thus affording a safe place for the disposal of our tailings and insuring a future compliance with this provision of our con-

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

tract. While this operation will be temporarily troublesome and expensive it is the only possible procedure that is entirely safe that is open to us under present conditions.

4. The 2,800-foot, 8-inch pipe line from the drain tunnel to "the sink" for the disposal of our "red" mine water has been completed and insofar as possible, protected. Its upper end is 16-inch. Mr. Sturgeon came well within his estimate on the cost of this installation.

5. Considerable trenching has been completed on the hill side to protect the drainage tunnel from continued damage by surface water and, in Mr. Collins' opinion, to minimize the chance of liability from the unimpounded tailings. I have no worthwhile opinion on this.

6. The installation of the electric hoist is completed and my advice is that it is operating satisfactorily.

7. The cage is also operating satisfactorily in the shaft.

8. The new mine cars are on hand.

9. The compressor is complete.

10. We are placing the one-inch compressed air line throughout the mine with 2-inch galvanized pipe.

11. The old stamp mill has been completely overhauled. It is ready to run. I expect trouble with it,

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

especially its ore elevating system which was so impossible before.

If this mill stands up, I have a plan for utilizing it for secondary crushing in the future which will salvage a part of its cost, in which case it will be further remodeled in the spring. Nothing but a trial can determine this.

12. Compressor and Hoist house is complete.

13. Heaters, as before reported, are installed.

14. All payrolls have, of course, been met promptly.

15. An intensive study of our metallurgical and operating problems has been and is being made and I am pleased to report substantial progress and the accumulation of much reliable information.

16. Preliminary surveys have been made by competent engineers of new roads, and their feasibility at a reasonable cost is assured. The construction, however, must await spring and the thawing of the ground. Possibly $2,500 or $3,000 will cover this cost.

17. We have been favored so far by a very open winter. We can not haul in the daytime but can haul at night when the ground is frozen.

18. Last week we put about 60,000 feet of mine timbers on the hill.

19. New jack hammers have been bought and received.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

20. I have bought and delivered to the mine supplies consisting of fuel oil, coal, carbide, steel, track, provisions, drills, explosives, equipment, etc., and barring accidents and after the usual adjustments we are ready to run and I am very much in hope we will be able to run throughout the winter. In fact, I expect it. It will enable us to gain much needed information.

We have spent $50,253.87 to date and I do not believe $500 of this has been wasted. On the other hand I have saved the Company more than ten times this amount that I know of by close personal attention to detail. Of this amount $10,000 was for your payment to the owners; $11,000 for payment for your major power line; $7,220.72 for consumable supplies for winter operations, and $14,274.37 for equipment such as compressor, hoist, pipe lines, auxiliary power line, mill motors, lighting plant, mine cars, new jackhammers, electric wiring, etc.

In concluding allow me to thank you gentlemen for your splendid cooperation and understanding. Your suggestions and advice have been timely and excellent and it is a pleasure to work with people who are familiar with the situation and who do not think that all you have to do is to buy something called a mill and start paying dividends.

The landscape is dotted with that kind of mills that never earn a dividend.

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

I wish you could find some way of acquainting your stockholders with the conditions, what you have accomplished and what you have gone through in the past for their sake. A few words on paper cannot begin to tell this story.

The devotion of Russell Collins to the interests of the Mutual is touching in the extreme. I know that he has gone hungry and cold in his endeavors to pull them out of the hole they had, through no fault of his gotten into.

Your President and also Director Ferbert have shown a willingness to sacrifice not only their time but also their money to benefit the stockholders and this, may I state, is in such marked contrast to the usual corporation director who is generally concerned only in protecting his own interests that it has furnished the inspiration and the incentive to me to carry on at a time when the association promised to become an unpleasant one.

Nor can I close without paying tribute to the faithful cooperation of our men at the mine and especially our underground man, Mr. Sturgeon, and our mill man, Mr. Haley. They have worked hard and faithfully for the Company and it is due to their devoted efforts that we are able to run this winter.

For example, our eight-inch pipe line was finished, well under Mr. Sturgeon's estimate of cost, on a

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

day when six inches of snow was blown off of the mountain by a howling blizzard.

They have given me at all times faithful cooperation even when perhaps they did not agree with what I was doing and I can depend on them to voice their independent opinions and then do their best to prove that they were wrong if I over-rule them. More than this, no manager can ask of any head of a department.

We all know the irreparable loss that the death of Mr. Keily was to the enterprise and to all of us.

While he had not been with me for several years on account of my retirement from mining, he has been in my employ without missing a pay day for 17½ years during which time he never received less than $300 per month and expenses.

Mr. Keily was a mining engineer of unusual ability in addition to being a practical miner and it was with a heavy heart that I consented to go on with you when he passed away for I had no hallucinations about the trouble and detail involved.

That with your cooperation this work bids fair to become more of a pleasure than a burden is the highest compliment I can pay you and I am endeavoring to so arrange your affairs that if anything happens to me that you would not be adversely affected.

In conclusion, may I sum up by saying that with economical and disinterested management and by

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

building up an efficient and loyal organization we have a fair chance of success. You may depend upon my best endeavors.

I have heard of efforts being made by unknown parties to buy stock cheap. I wish you could find some way to advise your stockholders to hold on to their stock. My interests are not for sale.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

Q. By Mr. Abel: Mr. Stiegler, the contract of September 2nd was signed subject to approval by the stockholders at a meeting called for the purpose?

A. I think that was the understanding; yes. I believe so.

Q. And the meeting was called for September 24th? A. Yes.

Q. Why wasn't it held?

A. Well, I took that up probably with our attorneys and they told us, or told me, that there was no use to go out for more authority; the stockholders had given us all the authority that they could give us, or words to that effect. That is my understanding, anyway.

Q. Did you have that opinion in writing?

A. Mr. Weller was present at a meeting, I think in Seattle. I don't know. I don't recall whether

(Testimony of J. E. Stiegler.)

(Plaintiffs' Exhibit 90 continued)

he wrote me a letter to that effect or not. He probably did, too. Mr. Weller was our attorney.

Q. And Mr. Grill, an attorney, was on the board?

A. Yes; was with us. Yes, sir. [284]

Q. When did you commence to tell people that the assets of Mutual Gold had been transferred to a corporation organized by Mutual Gold Corporation?

A. I don't remember. I didn't hold anything back from any of my friends around my section there. They were all informed. [285]

Redirect Examination

Q. By Mr. Hinckle: Mr. Stiegler, did you favor making the contract of December the 17th, 1938, which is the only one now in existence?

A. Yes; I think I did.

Q. With Mr. Garbutt?

A. I think I did; yes. I might—may I explain something there?

Q. All right.

A. I think—I don't remember just what the question was, what I wrote, but Mr. Grill or Mr. Ferbert and some of them, we were thinking of coming back down to Los Angeles again and instead, why, we decided that the thing to do was to send Mr. Grill down: and that was the time, I think, Mr. Grill made that trip by himself.

(Testimony of J. E. Stiegler.)

Q, Did this notice of forfeiture which had been given in August and which was withdrawn in October influence you to approve the contract in December? A. I don't think so.

Mr. Hinckle: That is all.

Recross Examination

Q. By Mr. Abel: Do you know why Garbutt, by the contract of October 31, 1938, terminated two contracts of September 2nd and September 22nd?

A. I have a faint recollection of something there. I [286] think it was something in regard to the tailings that were contaminating the stream where Mrs. Cunningham gets her water. I don't recall just what it was, but something to that effect, I think.

Q. Is it your understanding that the termination contract of October 31st, 1938 was made in order that, for the future at least, Mr. Garbutt would not be responsible for any injury or damage caused by tailings getting into the Cunningham water?

A. Well, that was the old tailing dump.

Q. Well, the point is, is that your understanding for the termination of the contract?

A. Well, I remember that there was something about those tailings. Just when it happened I don't know. [287]

Q. By Mr. Abel: You are now shown your letter, as president of Mutual Gold Corporation, of January 14, 1939, Plaintiffs' Exhibit 43; and

(Testimony of J. E. Stiegler.)

your attention is directed to a particular paragraph there.

A. It is hard for me to read that fine print.

Q. I will read that particular paragraph to you, Mr. Stiegler. A. All right.

Q. "As you are doubtless aware, a number of months this year were lost, during which the board was considering the offer of the Vance interests and the one made by Mr. Garbutt. After long delay and much opposition, the board finally concluded that it would be for the best interests of the stockholders to accept Mr. Garbutt's offer, which was reduced to a contract. This contract was more than lived up to by Mr. Garbutt. For various reasons, however, he desired to terminate the contract and a new one has been prepared which has met the approval of the board but has not yet been executed and delivered to the company by Mr. Garbutt. We should have some word on it before the stockholders' meeting." Was that a correct statement?

A. I think he more than lived up to his promises; yes. [288]

Q. No. The point is, this is the particular thing: "For various reasons, however, he desired to terminate the contract and a new one has been prepared which has met the approval of the board but has not yet been executed and delivered to the company by Mr. Garbutt."

A. That is probably right.

(Testimony of J. E. Stiegler.)

Q. So, then, on January 14, 1939, the date of Exhibit 43, the contract of December 17th had not been executed? A. I don't know.

Q. There was no other pending contract, was there?

A. Well, Mr. Grill was taking care of these contracts and one thing and another for us.

Q. Did he prepare this letter?

A. He helped me; yes. I think that he probably did.

Q. Then, if he was taking care of it, have you any reason to question that part of the statement that a new contract has been prepared and has met with the approval of the board, but has not been executed and delivered by Mr. Garbutt?

A. I have no reason to not believe it.

Q. Was there any contract other and later than that of December 17, 1938?

A. It strikes me that there were. I think there was.

Q. A later contract? A. December when?

Q. After December 17th and prior to January 14th. [289]

A. I don't recall. I don't remember those things. I have no records at home of any of this.

Q. But the point that I am getting out: This letter was sent out, issued by you to the stockholders? A. Yes.

Q. Under date of January 14th in preparation for the February annual meeting?

(Testimony of J. E. Stiegler.)

A. Annual meeting is right.

Q. Annual meeting, and the stockholders attended that annual meeting, were informed by the president that Garbutt had terminated his contract and a new one had been approved by the board but had not yet been executed or delivered?

A. Probably that is right.

Q. As late as January 14th? A. Yes.

[290]

WILLIAM L. GRILL,

called as a witness on behalf of the above named defendants, being previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Hinckle: Mr. Grill, what office, if any, do you hold with the Mutual Gold Corporation?

A. I am a director and, I believe, a vice president, although I am not sure. We have two or three of them.

Q. About how long have you been a director?

A. I don't recall. The minute book will show. I think, in '34, some time along there, or '35.

Q. Do you own any stock in the Mutual?

A. Oh, I own, directly and indirectly, some stock; yes.

Q. Do you know about how much?

(Testimony of William L. Grill.)

A. Oh, sixty, seventy or eighty thousand shares. I don't know exactly how many.

Q. By the Court: You say, "directly or indirectly." What do you mean?

A. Well, through a company.

Q. Do you own any stock yourself?

A. Oh, yes; this stock practically all belongs to me, but it is held in the name of the company. [297]

Q. By Mr. Hinckle: Does the Mutual Gold Corporation owe you any money, not for any services rendered, but that you have advanced?

A. I think for some traveling expenses; yes, directors meetings and something of that kind, for traveling expenses.

Q. Did you favor making the contracts of September 2nd and 22nd with Mr. Garbutt?

A. I did.

Q. Did you also favor making the one that is now in effect? A. I did.

Q. And that is dated December 17, 1938?

A. I did.

Q. Why did you favor making the first one?

A. Well, that gets back probably to somewhat of a story. The Mutual Gold Corporation was endeavoring to develop this property and it spent a good deal of money. Along in June some time there was a meeting—I think June 25th there was a meeting—called of the directors at the Vance Hotel; and I think at that time, or probably shortly prior

(Testimony of William L. Grill.)

to that, we had learned that Mr. Vance had employed a Mr. Cole to go down and make an examination of the property. This report was made available at that [298] meeting and it was reported by Mr. Vance that it would be necessary to organize a new company to take this thing over, to raise the money to fully develop it and equip it with a larger plant; and the proposition first submitted, I thought, was unfair to the small stockholders, and if my recollection is correct, it was a matter of a deal where the Mutual would retain a 40 per cent and the new company would get 60 per cent, and in addition to that, the advances made by Mr. Vance and the other stockholders, Mr. Ferbert and Mr. Stiegler, would get production notes plus stock as a bonus, the same deal that the $30,000 was raised, in which in effect nothing was paid for the stock, and the prior stockholders had paid from 6 to 7½ cents a share for their stock. Well, the discussions in that meeting—there were modifications made at that meeting or subsequent meetings.

Mr. Abel: Pardon me. What meeting is this now?

A. I think that is in June, 1938, June 25th, if my recollection is correct. I would not be positive because I do not attempt to remember these dates. And at that meeting or the next meeting we discussed the matter of getting other offers, not merely accepting one, to see what we could do; and there was discussion of a Stone offer by Mr. Stiegler. Mr.

(Testimony of William L. Grill.)

Stone had made a prior offer which had not met with the approval of the board and Mr. Vance. I think I suggested that they attempt to get the Sunshine [299] Mining Company to become interested and this thing delayed until it could be presented. And I believe that Mr. Vance and Mr. Lloyd Vance and several—I was not present—went over and contacted the Sunshine Mining Company and they were not interested, naturally, because of the way the matter was presented, I think, and probably for other reasons; and all of this time the directors were attempting to get some deal. Mr. Vance's deal was there pending and the minutes show that it was recommended to the stockholders because there was no other proposition then pending. Mr. Collins told me and, I think, the other members of the board, that he was going to California to see if he could not get some deal down here. He did not state who he was going to see. I believe he met Mr. Ferbert here or went down with him; and I think the first intimation of some deal came to that stockholders' meeting in Spokane. Mr. Ferbert and Mr. Collins said that they had interviewed, I believe Mr. Garbutt, and that there was a possibility of his making some deal.

Q. By Mr. Abel: When was this? Pardon me.

A. That was in that meeting of August 8th in Spokane, 1938, about that time. That is my recollection, although I am not positive about it. And

(Testimony of William L. Grill.)

I believe that a wire was sent about that time to Mr. Garbutt so we would have something in writing; and I think some answer came back which was given to the various members of the board and that was [300] the reason for the resolution being put in the form in which it was, to accept any other deal which might present itself.

The direct question, to answer that question asked, I had been somewhat familiar with the operation. I think I had made one trip up to the mine by that time, and possibly two trips, and my opinion was or conclusion that I had, and the statements that I made to the board and Mr. Vance, I believe, too, and to his son, that Mr. Vance was not a mining man, and that even if he employed one he would not follow his advice and would run it to suit himself. And chiefly for those reasons I was interested in attempting to get a mining company probably in there with plenty of means to develop this property, someone who was capable and knew the business and had means to carry it through. If we had to go outside of the Mutual Gold, why, I wanted to get into good strong hands and capable hands, that is, so far as I am concerned.

Q. By Mr. Hinckle: Were you influenced to favor the contracts of September, 1938 by notice of forfeiture?

A. Not so far as I was personally concerned; no. I was not influenced by it because I don't get

(Testimony of William L. Grill.)

alarmed, like possibly some business men do, by notices of that kind; and I was not alarmed by the threats made in these meetings of litigation by Mr. Vance if his deal was not made, either. That is not particularly in response to his question, but [301] I was not influenced by either.

Q. You were not influenced, I take it, then, by the notice to favor the contract made, or at least dated, in December, 1938, the one that is now in existence?

A. No; that would not have completely influenced me until——

Q. By the Court: Well, would it influence you at all?

A. I would say it did not influence me.

Q. By Mr. Hinckle: Have you been paid anything, other than some expenses, by Mr. Garbutt in connection with this?

A. I didn't consider Mr. Garbutt paid me any expenses. He advanced the money for Mutual. If it had been from him I would feel I should not have accepted it.

Q. Have you been paid anything for legal services rendered to Mutual?

A. Not by any source; and I have paid part of my own expenses. If I felt I could get someone everyone knew about and told Mr. Stiegler in those cases, as an advance for Mutual, to partly pay my expenses I got it.

(Testimony of William L. Grill.)

Q. Whose idea was it, if you know, that the Mutual Gold Corporation should be represented on the board of directors of the Log Cabin Mines Company?

A. Well, I think that in discussion in the board meeting it was at least my idea, and I think the contract might contain it, that we should have full minority [302] representation on the board.

Q. You still feel that way, do you?

A. I have no question about it. Under the cumulative voting system we are entitled to it legally.

Q. Did Mr. Garbutt agree to that when it was suggested to him?

A. He had no objection and I think the laws of the state provided for it, anyway.

Q. When did you first meet Mr. Garbutt?

A. Well, there was a resolution of the minutes that shows there. The time these contracts were being considered the board passed a resolution authorizing the members of the board to go down and meet him to consider this thing. The minutes show that I was going there as the attorney, also as the director, and I met him when I arrived here some time the latter part of August or first of September.

Q. And is that the time that you finally ended up in the contract of September 2nd? Is that the first time you ever met him? [303]

A. That is the first time I ever met him personally, ever met him.

(Testimony of William L. Grill.)

Q. Is it the first time you ever had any business dealings with him?

A. No. I talked to him over the phone about this contract—or not about the contract, but about the situation.

Q. By Mr. Hinckle: Did you know, Mr. Grill, about the suit that was filed in the City of Los Angeles in the Superior Court by the Log Cabin Mines Company against the Mutual Gold Corporation to quiet the Log Cabin Mines Company title to this contract dated July the 13th, 1938?

A. Yes. I have—— [304]

Q. By Mr. Hinckle: Was a meeting of the board of directors called and held at which the question of whether or not to defend the suit was considered?

A. Yes; there was a meeting called at which the matter was presented to the board, and the minutes so show the action taken by the board of the Mutual.

Q. By Mr. Hinckle: Did this suit follow or precede the filing of a similar suit by A. P. Bateham and others to quiet title in the State of Washington?

A. Well, I don't know the time the Bateham suit was filed; but it is my recollection that it followed it, and I don't think there is any question about it. [306]

Cross Examination

Q. When did you first become aware of the August 25, 1938 notice of rescission?

A. I can't answer that, but I believe it was

(Testimony of William L. Grill.)

brought [307] up in one of the directors' meetings. It might have been given to me outside of that. I don't recall now.

Q. And you were present upon the 2nd of September when the contract of that date was signed?

A. Well, I was—that is my recollection.

Q. Did you negotiate the contract?

A. Well, I was present when Mr. Stiegler was there, Mr. Ferbert, and I believe Mr. Collins and myself. [308]

Q. Was the contract drafted by the time you arrived?

A. I think there had been a contract form submitted to us. It is my recollection there had been a form submitted. Whether that had been sent up or not, I don't remember; but it is my recollection that there was one when we came down.

Q. Was it modified in any particular?

A. Yes; in some few particulars it was modified. [309]

Q. How long did it take to negotiate and draft the contract?

A. Well, we spent at least a morning going over these, or a half day at least, going over all the items that we had in mind.

Q. What were they?

A. I have told you I don't recall them at this time. Maybe during the course of this examination they will come to me. There were two or three things

(Testimony of William L. Grill.)

there. One comes to me now, the matter of something in the contract so that it could not be sold out from under us; and I think there was some modification of that which would give us certain rights to take this situation over. Then there was something taken up with reference to voting, the matter of full minority representation. I don't remember whether I was fully aware of the California law at that time, but I think I either looked it up there before I came or after I arrived, and whether that was in the contract I don't know, but that was one of the things I wanted to be certain about. [310]

Q. What, if any, consideration was given to the subject of the creditors of the Mutual Gold at that time?

A. Well, there was considerable given that first meeting. The chief creditor that we were disturbed about was Mr. Vance with his open accounts, and we arranged with Mr. Garbutt to borrow, or he would borrow the sum of $25,000.

Q. Was that embodied in the contract?

A. No; that was not embodied in the contract but I think there is something in the minutes, a report made in the minutes of Mutual, which, if you will look through, you will find.

Q. But that was a resolution trying to get $25,000—— A. Well, we stated——

Q. —which was refused, wasn't it?

A. If you will let me finish, I will tell you. You asked first, and I will tell you. He called up the

(Testimony of William L. Grill.)

bank there in our presence and asked for a loan of some $20,000 or $25,000.

Q. What date was that?

A. What is that?

Q. What date was that?

A. I can't tell you the date. During the course of these negotiations on this contract.

Q. On this contract of September 2nd?

A. That is my recollection. [311]

Q. Yes.

A. And someone he knew in the bank, and the banker said there was some meeting and he would have to call him back; and then he got some call back and said the loan was all right and we were to put up our stock, our half interest in the stock as security so we could——

Q. Half interest in what stock?

A. In the company to be organized.

Q. That was never organized, was it?

A. It was organized—Log Cabin Mines was organized in the first instance by Mr. Garbutt.

Q. Now you are shown Exhibit 13. Please show that part of the contract which has to do with taking care of the creditors of Mutual Gold.

A. Well, I have said—if it does not appear in here, and I haven't read it for some time—just as I have testified to you, the only creditor that we had any concern about was the open account of Vance's.

(Testimony of William L. Grill.)

Q. No. The point that I am trying to make is this: That there was at or about the time of the execution of this contract of September 2nd a discussion about Mutual Gold creditors, and when the contract was executed it was silent on the subject? A. I believe that is correct.

Q. And no provision made for creditors.

A. I believe that is correct, in the contract, to the [312] best of my recollection, without reading it.

Q. Turn to the minute about trying to borrow $25,000.

A. These are the minutes of the date of "September, 1938" in red at the top. [313]

A. (Reading) "It was regularly moved by Mr. Grill and seconded by Mr. Ferbert that the president of this corporation, Mr. J. E. Stiegler, be and hereby is authorized and directed, for and on behalf of this corporation, to borrow the sum of $25,000 from any person, firm or corporation, upon the best terms possible, giving the note of this corporation or other written obligation, and for and on behalf of this corporation to execute a pledge or assignment of any or all of the assets of the corporation as security therefor. Said motion carried by the votes of Mr. Stiegler, Mr. Ferbert, Mr. Hickcox, Mr. Collins and Mr. Grill. Mr. Woodworth and Mr. Vance voted 'No' thereon."

Q. And was that done? Was the $25,000 borrowed from anybody?

(Testimony of William L. Grill.)

A. No. Mr. Vance refused to take the money, to take these open account advances. [314]

Q. Was it offered him?

A. Oh, you ought to know. You were down here at one time.

Q. It was, it was offered?

A. I say it was offered to him, the money was offered to him and it was refused.

Q. When?

A. I don't remember now, but it was refused. He refused to accept it and said, "Well, no;" unless he got his production notes secured by a mortgage on the assets or in some other fashion. That is what we discussed down here at one of these sessions I came down. [315]

Q. By Mr. Abel: How much have you received in traveling expenses through Mr. Garbutt?

A. The two occasions are the only occasions that I ever received anything from him, and those were loans to Mutual, as I have stated.

Q. Well, who on behalf of Mutual arranged the loans?

A. Well, I discussed on each occasion with the president of the company, Mr. Stiegler, told him what the circumstances were.

Q. On each occasion?

A. Of these two particular occasions; and in addition to that—well, I guess I had better not say anything more. [316]

(Testimony of William L. Grill.)

Q. What else? A. What is that?

Q. What have you in mind?

A. Well, I said that on one other occasion they paid it out of their own pockets as a part of my expense, Mr. Ferbert and Mr. Stiegler.

Q. With reference to the Los Angeles quiet title suit how and when did the existence of that suit come to your attention?

A. To the best of my recollection, through Mr. Garbutt.

Q. When?

A. I can't tell you the dates. There was some correspondence in connection with it. [317]

Q. By Mr. Abel: The first letter is a letter from Garbutt to yourself giving information of the quiet title suit in Spokane? A. Yes.

PLAINTIFFS' EXHIBIT 91

April 15, 1939

Mr. Wm. L. Grill,
Colman Building,
Seattle, Wash.

Dear Mr. Grill:

The office this day received from O. C. Moore, Attorney at Law, Spokane, who, it is presumed, is a partner of Abel, a summons and complaint by mail, in suit No. 103,233, which is apparently the

(Testimony of William L. Grill.)

same as the copy you sent Mr. Hinckle. This was addressed on the envelope to

Log Cabin Mines Company
411 W. Seventh St., Room 712,
Los Angeles, California.

Mr. Hinckle thinks it is doubtful whether such a suit to quiet title could be successfully maintained on service by publication in the State of Washington as the contract in which title is sought to be quieted is no longer within that jurisdiction.

The property itself is in California, the contract is not in Washington, and neither is it in the possession of nor does it belong to the Mutual Gold Corporation.

Yours sincerely,

FRANK A. GARBUTT.

FAG-C.

April 21, 1939

Mr. Wm. L. Grill,
Colman Building,
Seattle, Wash.

Air Mail

Dear Mr. Grill:

In discussing with Mr. Hinckle today the advisability and possibility of a quiet title suit by the Log Cabin Mines Company against the Mutual, et al, Mr. Hinckle suggested that the Mutual itself has

(Testimony of William L. Grill.)

no defense and could probably file a disclaimer as an answer.

He also suggested the advisability of bringing this suit against every stockholder the Mutual has.

In order to do this, we would have to have your list of stockholders to date, and their addresses, because it will be necessary to send a copy of the complaint to all of them by registered mail. At the same time we ought to include any creditors you have who are not stockholders. I do not know whether the Vance Lumber Company is a stockholder or not but it should be included in any event, I think.

Mr. Hinckle has also suggested that filing this suit against the stockholders who are loyal to you might cause some comment, in which case we might segregate the sheep from the goats and file the quiet title suit against those who differ with you. It would also save some money in registered mail, etc.

With kind regards.

Yours sincerely,

FRANK A. GARBUTT.

FAG-C.

cc to Mr. Weller.

(Testimony of William L. Grill.)

Law Offices of
JONES & BRONSON
Colman Building
Seattle

April 24, 1939

Mr. Frank A. Garbutt
712-411 West Seventh Street
Los Angeles, California

Dear Mr. Garbutt:

Re No. 112, you may rest assured that I do not now have, nor have ever had the impression that you will get weak-kneed with reference to the litigation.

Replying to yours of the 21st, 113, will say that I quite agree that the Mutual could file a disclaimer of no defense as an answer to an action to quiet title.

It would seem to me to be a rather extended proceeding to make all of the stockholders of the Mutual a party to such action. However, it might be advisable to include those who may be in a position by reason of having finances as parties thereto, as well as creditors. If you desire to make all of the stockholders parties, we will be glad to forward a list, together with their addresses. If you desire a list of those who have opposed the situation, which would include the Vances and the Vance Lumber Company, we will have this prepared.

(Testimony of William L. Grill.)

As I have written you, we are going to hold our directors' meeting early in May and if you desire to present anything to the board with reference to the approval of the loan which you have suggested, as well as the ratification of all acts of the officers between meetings, please have Mr. Hinckle prepare what you want and it will be presented.

With kindest regards, I am

Yours sincerely,

W. L. GRILL.

WLG:pb

May 18, 1939.

Mr. Wm. L. Grill,
Colman Building,
Seattle, Wash.

Air Mail

Dear Mr. Grill:

The Log Cabin Mines Company has brought suit to quiet title to the contract and property and Mr. Hinckle served Mr. Collins, as representative of the Mutual.

As the Mutual was served out of the county, it has thirty days in which to answer, after which time a default can be taken.

In order to be assured that the Mutual has actual knowledge of the matter, I am sending you herewith copy of the Complaint and Summons although I presume that Russell has advised the Company prior to this.

(Testimony of William L. Grill.)

In any event, you can acquaint either the Company or Mr. Weller with it, as you think best.

Mr. Hinckle thinks that a quiet title suit by the Log Cabin against the Mutual will be sufficient and that any person else who holds through or under the Mutual will be bound thereby.

However this may be, we can get a quick judgment against the Mutual and go to trial or secure a default quicker, and in event it should be deemed necessary, we can sue the others later.

If the Mutual appears we can agree on an early trial and if it does not appear we can take a default on or about June 7th.

Sincerely,

FRANK A. GARBUTT.

FAG-C.
Enc.

Law Offices of
JONES & BRONSON
Colman Building
Seattle

May 22, 1939

Mr. Frank A. Garbutt
712-411 West Seventh Street
Los Angeles

Dear Mr. Garbutt:

I wish to again thank you for the picture of the tailings dam, as I had not heretofore received one.

(Testimony of William L. Grill.)

This is likewise a good picture and would indicate that these tailings should bother no one. Whenever you can deposit your tailings for stope filling as you suggest, it will mean an additional saving.

I wish to acknowledge receipt of your favor of the 18th enclosing copy of your suit to quiet title. I think we should call a meeting of the board of directors about the time you can take your default so that the entire board will have knowledge of your action and it cannot later be said that any advantage was taken of the situation. I will try to arrange for a meeting at about that time. The Mutual has no defense and would have none, even if it appeared.

With kindest regards, I am

Yours sincerely

W. L. GRILL.

WLG:pb

Law Offices of
JONES & BRONSON
Colman Building
Seattle

May 25, 1939

Mr. Frank A. Garbutt
712-411 West Seventh Street
Los Angeles, California

Dear Mr. Garbutt:

Replying to yours of May 18 more specifically, I have asked Mr. Stiegler to call a meeting at my

(Testimony of William L. Grill.)

office to determine whether or not to defend your suit. I think the board should act upon this.

Of course there is no defense, but I don't want it asserted later that the board should have taken action and did not do so.

Yours very truly
W. L. GRILL.

WLG:pb

Law Offices of
JONES & BRONSON
Colman Building
Seattle

June 8, 1939

Mr. Frank A. Garbutt
712-411 West Seventh Street
Los Angeles, California

Dear Mr. Garbutt:

Yours, #163, 164 received.

I forgot to inform you that at the directors' meeting held here, a resolution was passed to the effect that the company would not defend the suit to quiet title which you have instituted. We thought it advisable to bring the matter before the board so that full knowledge would be had of such action by it.

You will find enclosed herewith minutes of the meeting for your files.

(Testimony of William L. Grill.)

With kindest regards, I am

Yours sincerely,

W. L. GRILL.

WLG:pb

Q. By Mr. Abel: The first letter informed you that a suit was pending, had been brought in Spokane County? A. Yes.

Q. To quiet title to the contract, the purchase [319] contract? A. Yes.

Mr. Moore: What is the date of that?

Mr. Abel: April 15, 1939. May I read these to your Honor? It will save a lot of examination.

Q. By Mr. Abel: On the 21st you received another letter?

A. No; I probably received it later than that date. That is the date of the letter. I apparently received the original of that letter.

Q. In which he suggested the advisability of a quiet title suit by Log Cabin Mines?

A. That is my recollection of the letter.

Q. Against Mutual; and Mutual had no defense and would probably file a disclaimer?

A. Correct.

Q. And Mr. Hinckle also suggested the advisability of bringing this suit against every stockholder Mutual had?

A. That is what the letter states.

(Testimony of William L. Grill.)

Q. And then you replied on the 24th?

A. Yes. [320]

Q. This is your letter?

A. That is my letter; yes.

Q. In which you agreed that the Mutual could file a disclaimer to make no defense to the action to quiet title?

A. Whatever the letter states there.

Q. That was your advice, was it not, to Mr. Garbutt?

A. I don't believe that is the language I used. I don't remember it. I think I said they had no defense to the action. I don't remember what the exact language was, but I think I said that.

Q. Quoting from the letter:

"Replying to yours of the 21st, 113, will say that I quite agree that the Mutual could file a disclaimer of no defense as an answer to an action to quiet title." A. Well, I said it.

Q. And you offered to furnish him a list of the stockholders? A. Yes; I believe so.

Q. The stock-holding defendants, so that they could be brought in, including the Vances and the Vance Lumber Company? A. Yes.

Q. And then you were informed on May 18th that suit had been brought and Mr. Hinckle had served Mr. Collins?

A. If that is what it so states. I can't remember all of it. [321]

(Testimony of William L. Grill.)

Q. When did you receive a copy of that complaint?

A. I will have to refer to the correspondence to see.

Q. Did that letter of May 18th enclose a copy?

A. It so states. I presume that I received it.

Q. A copy of that complaint?

A. It says, the letter of May 18, 1939: "In order to be assured that the Mutual has actual knowledge of the matter, I am sending you herewith copy of the Complaint and Summons although I presume that Russell has advised the Company prior to this." Russell Collins that means.

Q. That was on May 18? A. '39.

Q. And the next meeting of the board of directors of Mutual was on June 6, was it not?

A. I can't tell you without the book, without the minute book.

Q. You are shown the minute book of that date. The meeting was held at your office?

A. Apparently so. June 6th.

Q. Was the meeting held in your office?

A. Yes; it was held in my office. [322]

Q. But you were there?

A. Yes; I was present at the meeting. The minutes so show.

Q. Now I read and quote:

"It was moved and seconded that inasmuch as the Mutual Gold Corporation has no interest

(Testimony of William L. Grill.)

in the mining claims in California at this time that the Company make no defense to the action of"——

then Mr. Garbutt's name appears in type and a line through it and above it

"Log Cabin Mines Co. brought to quiet title to said claims in the Log Cabin Mines Company. Motion was carried by the votes of J. E. Stiegler, G. H. Ferbert and W. L. Grill. Opposed Lloyd J. Vance."

A. Yes; it was brought up at that meeting and discussed.

Q. Yes.

A. And the result was and the action of the board that no defense be put in to this quiet title suit.

Q. Then, would you say that it was not until June 6th that the matter came to the attention of the members of the [323] board, except yourself.

A. I would not say that because I am certain that it had been brought to the attention—I know that it had—of Mr. Stiegler and Mr. Weller in Spokane.

Q. How do you know that?

A. Well, my recollection is that I have some correspondence in my office between Mr. Weller and myself, although I haven't it with me and that is just my recollection, and possibly some with Mr. Stiegler, too. [324]

(Testimony of William L. Grill.)

Q. Weren't you in daily communication with Mr. Garbutt during this whole period?

A. I was not.

Q. By phone and by letter?

A. I was not. What period now are you referring to?

Q. During the period of the two quiet title suits?

A. Well, I was in correspondence with him, but not in daily correspondence with him.

Q. Didn't you advise him that the quiet title suit could not be maintained in the State of Washington because the property was in California?

A. No; I wouldn't say that. If the parties were before the court in Washington I think the Washington court could pass upon it. But I think they couldn't get——

Q. How could jurisdiction be acquired of Log Cabin?

A. Well, I say that that was the point; you couldn't serve the Log Cabin in Washington.

Q. Now, then, wasn't it with that in mind that you resigned off the board of Log Cabin?

A. Yes. At first blush, when I heard of it, I thought: Well, we better get off; and on the second consideration, I came to the conclusion it was not necessary and went back on later.

Q. I know.

A. But you are quite correct, however, that I did resign as soon as I learned about it. [325]

(Testimony of William L. Grill.)

Q. You resigned from the Log Cabin Mines so that service could not be made upon you in the State of Washington on Log Cabin Mines?

A. Yes; and I think I so advised Russell Collins.

Q. All three directors of Log Cabin Mines went off the board at about the same time in the State of Washington?

A. I think two or three went off. If they were all on, they all went off. [326]

No. 10,078

United States

Circuit Court of Appeals

For the Ninth Circuit.

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 485 to 825

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

No. 10,078

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Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

JOSEPH A. VANCE,

called as a witness on behalf of defendants, being first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

A. Joseph A. Vance, Seattle.

Direct Examination

Q. By Mr. Hinckle: Mr. Vance, you were a director of Mutual Gold Corporation, were you, on August 6, 1938? A. Yes.

Mr. Abel: Speak up, speak up, please.

A. Yes.

Q. By Mr. Hinckle: You had been a director for some years before that, had you not?

A. Yes, sir.

Q. You remained one until September the 19th, 1938, did you not?

A. I think it was September the 19th; August 19th or September 19th.

Q. It was about that date. That is close enough as far as I am concerned. You had read the proposed Garbutt contract, had you, Mr. Vance, before it was approved by the board of directors?

A. No; I don't think so.

Q. I will show you here a 4-page letter which does not bear date but which, as a matter of fact, was sent out about [327] September the 12th, 1938 and which bears or apparently bears your signature, and ask you if that is your signature, Mr. Vance?

A. Yes.

(Testimony of Joseph A. Vance.)

Q. Did you write this letter by yourself or did you have some assistance in writing it?

A. Well, I might have had a little assistance.

Q. Who gave you the assistance?

A. I am not certain, but I think it was Mr. Abel. I wrote most of the letter myself.

Q. This is addressed, as you will note, to the "Stockholders of Mutual Gold Corporation." Did you cause that to be sent out to the stockholders of the Mutual Gold Corporation, Mr. Vance?

A. Yes.

Q. Isn't it true that you sent this out for the purpose of acquainting them with your objections to the Garbutt contract? A. Yes. [328]

Mr. Hinckle: I will offer it as Defendants' exhibit.

The Clerk: B.

DEFENDANTS' EXHIBIT B

(Post card addressed to)

Mr. A. P. Bateham,
424 Symons Block,
Spokane, Wash.

PROXY

Know All Men by These Presents that I, the undersigned, do hereby constitute and appoint A. P. Bateham or R. P. Woodworth or..... my true and lawful attorney to represent me at the Special Meeting of Stockholders' of Mutual Gold

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

Corporation to be held on the 24th day of September, 1938, at eleven o'clock A. M., at the office of the Company, 401 Fernwell Building, Spokane, Washington, and I do hereby revoke any and all proxies by me heretofore given; and I do hereby direct my said proxy to vote against the Garbutt contract, and do hereby otherwise authorize and empower my said proxy to vote at said meeting and at any adjournment or adjournments thereof for me, and in my name and stead, upon the stock now standing in my name on the books of the said Company, hereby giving and granting unto my said attorneys, and each of them, full power of substitution and all the power that I should possess if personally present at such meetings.

Witness my signature this ..... day of September, 1938.

Witnessed by:

.....

(Date, sign and mail at once)

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

[Sent out to Stockholders of Mutual Gold from Seattle (not at company's expense)]

[Sent with Fuson's letter of 1-2-40]

(Not dated)

(Sent about 9/12/38)

Stockholders of Mutual Gold Corporation.

Dear Stockholder:

I became actively interested in the Mutual Gold Corporation in the Spring of 1936, when I was made General Manager of the Company. At this time the Company was out of funds and had obligations to meet which included the completion of the mill. I, at that time, agreed to underwrite an issue of $30,000.00 in production notes and stock to complete the mill and put it into production. I asked to be made General Manager as I wanted to know where my money was being spent, and how. My original estimate of the cost of completing this mill would have stood correct at $30,000.00 if it had not been for the fact that the mine had been so poorly managed previously that the following items, which I did not know about, had to be repaired:

	Approximate
1. Repairs to auto truck	$ 700.00
2. Replacement of frozen water pipe (4000 feet)	1,600.00
3. Repairs to flume	840.00
4. New pipe for flume	180.00
5. Hauling of same	25.00

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

6. New pipe to cook house and mill	750.00
7. Other cost for office expense which was not figured in the cost of erecting the mill:	
Office expense	2,810.00
Capital Stock Tax	1,403.85
Insurance	748.30
Total	$9,057.15

The additional money necessary to complete the mill, in the amount of $8,000.00, I advanced personally on open account. Again, when the November 1st, 1937, payment on the contract of $10,000.00 was due, Mr. Ferbert and Russel Collins begged me to advance the money to save the property, for which I wrote my personal check.

The Directors of Mutual Gold Corporation suggested that Mr. M. J. Keily be made superintendent of the Mine. Mr. Keily was a representative of the Mine looking out for the interests of the owners and at the same time superintendent of our Mine.

In the fall of 1937, while the property was in operation, I was there personally on the ground and the mill showed a gross return of around $10,000.00 per month, which left a small balance for profit. I told Mr. Keily at that time I could see no reason why the Mine should not produce the equivalent of that every month as I knew it could be done if it were properly worked.

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

About this time they were having trouble with stacking of the tailings. I suggested that three settling dams be put in but Mr. Keily, against my orders, spread them over the hillside. This made it impossible for us to recover anything from the tailings and at the same time caused some water pollution to a stream below us.

Every engineer and all the members of the Board of Directors who have looked at the property were of the opinion that we had free milling ore. Mr. Keily, the mining superintendent, was no exception. I asked him and Mr. Haley, the millman, in the fall of 1937 if we should not take samples of heads and tails to see what possible loss we were having. Mr. Keily made the statement that he knew what they were getting out of the mill and that they were recovering all that could be expected. However, assays were taken which proved unreliable as Mr. Haley, who had taken the samples, had no doubt made several mistakes as in some cases the tails ran higher than the heads. These returns were not known until the snow set in. If the tails were running out of proportion to what they should, the question would be whether to shut down or to operate and develop further ore reserves. Mr. Keily, Ferbert, Collins and other members of the Board were firm in the belief that the thing to do would be to develop a greater tonnage. The work was con-

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

tinued and it is true that a Mine has been developed due to the operation last winter.

No further samplings were taken until the next spring when I convinced the Board of Directors the smart thing for us to do would be to take a competent engineer down on the property and make a report to us as to the amount of ore we had in sight, the value per ton of recovery we had made and what our loss was. No one knew what the loss of the tailings was until after the engineer, Mr. Cole, had made his report in June. This report, by the way, has been the only thorough and finished report that has ever been made on the property, the general substance of which was given in the annual report of the President and by Mr. Cole himself, at the stockholders' meeting in Spokane on August 6th, 1938.

In the first part of May, Mr. Keily shut the mill down because of the runoff of the snow carrying the tailings down the hill and polluting the stream below.

Immediately after the report was finished, I decided the only thing for the Mutual Gold to do would be to put the Mine into production this summer as there was a $10,000.00 payment due on the contract November 1, 1938, and as it would cost another $10,000.00 to $20,000.00 to carry on through the winter. In addition to that if the mill were put

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

into production, there would be a year's time saved due to inaccessibility to the Mine during the winter months.

Several large mining concerns were contacted by myself and the Directors to make a sale of one-half interest or better in the Mutual Gold Corporation and its property, so that sufficient money would be raised to insure the erection of a large mill and cyanide plant and enough funds to take care of the outstanding obligations of approximately $22,000.00. It soon became evident that we could not interest any one in this proposition and in order to assure the completion of the mill and power line and have sufficient money for supplies my son, Lloyd J. Vance, made a proposal that he would personally guarantee up to $70,000.00, sufficient funds to do the same. This proposition has been more fully described in the President's letter to the stockholders of July 20th.

The Board of Directors recommended the acceptance of this proposal and called a meeting of the stockholders for August 6th, 1938, to ratify it. The two-thirds majority of the stock was represented which gave the Board of Directors the authority to make a deal with Lloyd J. Vance, or any different deal that they saw fit.

At this time Russell Collins and Mr. Ferbert had a telegram from Mr. Garbutt, the Owner's repre-

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

sentative in Los Angeles, alleging that he had a party in California that would be willing to make approximately the same kind of deal that Lloyd *and* proposed. The Board then refused to take action on the Lloyd J. Vance proposal had delegated Mr. Ferbert and Mr. Collins to meet the party in Los Angeles to work up some form of a contract. This was done over the objection of Mr. Woodworth and myself as I was afraid it would mean such delay that it would be impossible to get the new mill in before snow fall, and also because of the fact that I did not believe they would offer a contract as reasonable as the one offered by Lloyd, nor would it give the stockholders, both large and small, the privilege of sitting in on the new company on an equal basis. If the stockholders did subscribe, they would have complete control of the new company. Lloyd's contract was merely a guarantee so that the property could immediately be put into production. Five Directors' meetings have been held since that time, each meeting expecting to take action on Lloyd's proposal or the one later submitted by Mr. Garbutt personally, the owners' representative, continually delaying a fair offer trying to get a similar one from Mr. Garbutt.

Mr. Garbutt has sent us a letter as notice of cancellation of the contract which, if legal, would mean the Mutual Gold has lost its mine. However, I would

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

not be disturbed about this as I have had legal advice from various competent attorneys that the contract is not subject to cancellation at this time under the law. In addition to this unfortunate occurrence, the delay will have cost Mutual Gold Corporation approximately $150,000.00 that would have accrued over the period of the next ten months in the way of profits and an additional cost that will have to be met to carry on this winter, in the amount of $20,000.00.

I have done everything that I possibly could to save this property for the stockholders and at the same time to protect your interest and my interest, and all would be in fine shape now if it had not been for the delay caused by the Board of Directors. A fairer proposition than the one presented by Lloyd could not have been given the Mutual Gold Corporation, nor has a proposition anywhere nearly as good been submitted to date by any member of the Board.

The majority of the Board of Directors have entered into a contract with Mr. Garbutt, and a meeting of the stockholders is being called to ratify this agreement, or failing in that to authorize the deal with Lloyd or any other deal that may be submitted at that time. The proxy that will be sent you for that meeting contains the name of Mr. J. E. Stiegler, and unless you cross out this name and

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

write in the name of someone else who is opposed to the deal, your proxy may be voted in favor of the Garbutt deal.

The Garbutt contract should be rejected by the stockholders of Mutual Gold Corporation because:

(1) The directors of Mutual Gold have really been forced to execute it under a threat that the owners would forfeit the contract of purchase of the mine property and at the same time the agent of the owners insists upon a sale of the property to himself.

(2) The Garbutt contract provides that the property be conveyed to him and he is not actually required to put up over $10,000.00. The corporation he is to organize can really do what it pleases with the property. Please carefully read the Garbutt contract, Paragraph 2. The corporation is to agree not to sell the real estate unless the "(a) written consent of the seller", or "(b) the vote of a majority of the directors of the corporation", that means the Garbutt corporation, or "approved by its stockholders", that means the stockholders of the Garbutt corporation. Since Garbutt will have fifty percent of the stock plus our share, if he decides to sell he can vote to do so and in that event he can sell for much or little as he pleases, and the stockholders of Mutual Gold are out. In this way Garbutt can obtain title to the Mutual Gold property for

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

$10,000 and the corporation he forms can sell when Garbutt or his board of directors decides and at any price they please. There is no provision at all in the Garbutt contract that the creditors or stockholders of Mutual Gold Corporation shall be paid anything.

(3) While Garbutt's corporation is to furnish additional funds to a minimum of $100,000, there is no provision as to what the capital stock of the Garbutt corporation shall be, or that it will ever have funds with which to pay the $100,000. The joker in this respect is in Paragraph 2 of the Garbutt contract, under which he is to transfer the titles received from Mutual Gold and issue all of the capital stock of the new corporation fully paid up, so that there will be no money go into the Garbutt corporation unless it borrows it. It will have no stock for sale to realize money from. In Paragraph 9 of the Garbutt contract the buyer agrees to co-operate with the seller in every reasonable way to protect the stockholders' interest in order that the smallest shall receive benefits proportionate to the largest. Perhaps Mr. Garbutt thinks the forfeit of the Mutual Gold contract is reasonable.

(4) The 9th paragraph also provides that the buyer shall be entitled to be repaid for all advances made by him out of the profits or funds. These advances would be the original $10,000 and all the

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

subsequent money that goes into the Garbutt corporation. In this respect, all the advances made by Garbutt or the Garbutt corporation will be loans, so that it will have received a deed to all the Mutual Gold property and yet get back all that it has paid or advanced before Mutual Gold stockholders are entitled to receive anything, with no provision to pay creditors of Mutual Gold.

(5) Paragraph 9 does not require Garbutt to make any advances. He may quit after putting in the first $10,000. He may then decide to stall and if he does the only remedy that Mutual Gold has will be to elect a majority of the board of directors, in which event Garbutt shall be entitled to "the repayment to the Buyer of the monies advanced by him, or (b) the securing of same by a first lien upon the assets of the corporation".

(6) Garbutt represents the owner, and if he should refuse to put in over $10,000.00 the property is lost to Mutual Gold because Garbutt and the owner will be controlling on both sides of the table —buyer and seller—owner of the mine and the operating company. If Garbutt advances only the $10,000 and then quits there can be no profits out of which to pay him and he will then have to be paid out of funds derived from sale of the property, and since the title will be in the Garbutt Company, he can make sale in order to pay himself. The

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B continued.)

only other way to pay him would be the sale of the stock obtained by Mutual Gold.

(7) If the Garbutt contract is approved Mutual Gold will have no money at all to pay its creditors, and to raise money to do so there is a verbal proposal from Mr. Garbutt that he will arrange a loan of $25,000 and all of the stock that the Mutual Gold receives of the new corporation will be put up as collateral. Since Mutual Gold will have no money to pay the $25,000 and no stock to sell to repay it, the practical effect will be that Mutual Gold will lose all the stock it received from Garbutt in his corporation and the present stockholders of Mutual Gold will receive nothing.

At the last stockholders' meeting you authorized the board to accept the Lloyd J. Vance proposal or any other proposal. This proposal was very much better for the stockholders than the Garbutt proposal because:

(a) All stockholders of Mutual Gold had the right to come in and participate on equal terms.

(b) Lloyd Vance agreed to advance $70,000 and if not subscribed to by present stockholders he was to take stock in the new company and be repaid out of profits.

(c) He agreed to take care of the debts of Mutual Gold. The new company to be organized was to have only fifty per cent of the property, the other

(Testimony of Joseph A. Vance.)

(Defendants' Exhibit B—continued)

fifty per cent remaining the property of Mutual Gold.

Under the Garbutt contract he "advances" (really a loan) only $10,000 and is to get a deed to all the property.

I ask you to be present at the stockholders' meeting or give your proxy to R. P. Woodworth who will be sure to vote against the Garbutt proposal and indicate your preference for the Lloyd Vance proposal.

J. A. VANCE,
General Manager
Mutual Gold Corporation.

Q. By Mr. Hinckle: I show you another letter, Mr. Vance, that bears date January 21, 1939, and apparently has [329] your signature. Is that your signature?

A. That is supposed to be my signature. It has been so long, it has been so long since I have read those things. That is my signature all right.

Mr. Abel: Concede the letter.

Q. By Mr. Hinckle: Do you concede, Mr. Vance, that this was sent out to the production noteholders of the Mutual Gold Corporation on or about the date it bears by Mr. Vance?

A. Well, I think so.

(Testimony of Joseph A. Vance.)

Mr. Abel: I make the admission.

Mr. Hinckle: I offer this as defendants' next exhibit.

The Clerk: Exhibit C. [330]

DEFENDANTS' EXHIBIT C

Seattle, Washington
January 21, 1939

To Production Noteholders of Mutual Gold Corp.

Dear Noteholder:

I have been notified the anual meeting of the stockholders of Mutual Gold Corporation will be held at Spokane on February 1st.

Unless you have disposed of your stock in Mutual Gold, you have undoubtedly been advised as to the Board's action in transferring all of the assets of Mutual Gold to a Mr. Garbutt. As noteholders you and I are vitally interested in the effect this transaction will have upon our security and collection possibilities.

As a matter of fact our present Board has ignored our interests entirely. What security we might have had is gone. Mr. Garbutt now has possession of our property in addition to a first lien on it.

At the time these notes were sold, the directors and officers of Mutual Gold entered into a written contract with me making me general manager of the property, as I was the largest contributor, with the provision that either I or some other person

(Testimony of Joseph A. Vance.)

elected by a majority of the noteholders should continue as manager until our money had been returned. The same officers and directors now have transferred all of the assets; have given the management of the property to Mr. Garbutt; have recognized his advances as a prior lien and left us with nothing, neither a promise we will be paid nor a hope that we might.

As far as my personal advances are concerned I am going to do all I can to see that some way can be arranged for their payment.

At the meeting to be held on February 1st, I shall personally be present and am enclosing a proxy for you to sign and return to me if you cannot be there personally.

A new Board of Directors will at least be a step in the right direction.

Yours very truly,

J. A. VANCE

[Sent with Fuson's letter of 1-2-40]

Q. By Mr. Hinckle: Mr. Vance, did you attend a meeting of the Mutual stockholders which was held on August 6, 1938? A. August the 19th?

Q. August the 6th. A. Yes.

Q. Did you at that meeting vote for the resolution that was adopted at that time authorizing the

(Testimony of Joseph A. Vance.)

directors to deal with the property as they saw fit, or words to that effect?

Mr. Abel: Well, may I make an admission? I don't want to be precluded on the form of the question as to the contents of the resolution. I admit that Mr. Vance voted for the resolution.

The Court: The minutes speak for themselves.

Mr. Abel: On which you rely to justify the new corporation.

Mr. Grill: The minutes do not show that particular portion.

Mr. Hinckle: I think the minutes won't show that.

Mr. Abel: They do not show that Mr. Vance personally voted.

Mr. Grill: Is it admitted? [334]

Mr. Abel: I concede that he did.

DEFENDANTS' EXHIBIT E

September 20, 1938

Stockholders of Mutual Gold Corporation

Dear Stockholder:

We, the undersigned stockholders of Mutual Gold Corporation, protest the action taken by the Board of Directors at a Special Meeting held in Seattle Monday morning, September 19th, at which meeting the majority of the Board voted in favor of cancelling the stockholders' meeting called for Septem-

(Testimony of Joseph A. Vance.)

ber 24th at Spokane. Those voting for were Mr. Stiegler, Mr. Hickcox, Mr. Grill, Mr. Ferbert and Mr. Collins. Those voting against were Mr. Woodworth and Mr. Vance.

The Board then immediately ratified the Garbutt contract and authorized its officers to deed all of our right, title and interest in everything the Mutual Gold Corporation owns to Mr. Garbutt. Those voting in favor were Mr. Stiegler, Mr. Hickcox, Mr. Grill, Mr. Ferbert and Mr. Collins. Those opposed were Mr. Woodworth and Mr. Vance. Immediately thereafter Mr. Woodworth and Mr. Vance resigned as directors of the Mutual Gold Corporation explaining that they did not feel this action taken was to the best interests of the stockholders. They refused to be any longer connected as officers of the corporation.

The Board's purpose in calling the stockholders' meeting was to leave the decision up to us stockholders as to whether or not we were in favor of the Garbutt deal. They now have taken that decision out of our hands.

We have been opposed to the Garbutt proposition and now we are even more incensed over the action taken by the Board. We are notifying you that regardless of the Board's decision, a stockholders' meeting will be held at Spokane on the 24th. We are sending our proxies to Mr. Bateman and Mr. Woodworth protesting the Garbutt deal and urgently request that you do the same so that you may

(Testimony of Joseph A. Vance.)

go on record as having been opposed to the Board's action and Mr. Garbutt's contract.

If you have already signed a copy to Mr. Stiegler and you sign and date the enclosed proxy, the one to Mr. Stiegler will be cancelled. Please mail immediately.

Yours very truly,

CHARLES DUNN
WALTER G. PEEBLES
LOUISE WOODWARD
E. C. STAHLHUT
MERRITT H. C. ALLEN
ELMER T. FEHNEL
W. D. CHARLES

[Sent out to stockholders (not by Co.)]

PROXY

Know All Men by These Presents that I, the undersigned, do hereby constitute and appoint A. P. Bateham or R. P. Woodworth or..... my true and lawful attorney to represent me at the Special Meeting of Stockholders' of Mutual Gold Corporation to be held on the 24th day of September, 1938, at eleven o'clock A. M., at the office of the Company, 401 Fernwell Building, Spokane, Washington, and I do hereby revoke any and all proxies by me heretofore given; and I do hereby direct my said proxy to vote against the Garbutt contract, and do hereby otherwise authorize and em-

(Testimony of Joseph A. Vance.)

power my said proxy to vote at said meeting and at any adjournment or adjournments thereof for me, and in my name and stead, upon the stock now standing in my name on the books of the said Company, hereby giving and granting unto my said attorneys, and each of them, full power of substitution and all the power that I should possess if personally present at such meetings.

Witness my signature this ..... day of September, 1938.

.....

Witnessed by

.....

(Date, sign and mail at once)

DEFENDANTS' EXHIBIT F

Spokane, Washington
January 30, 1939

Mr. Charles Blank,
Latah, Washington.

Dear Mr. Blank:

The Stockholders Protective Committee of the Mutual Gold Corporation feels that some change should be effected in the Garbutt contract to protect the stockholders of the Mutual Gold against the loss of their property, and believe that some

(Testimony of Joseph A. Vance.)

changes in the contract should be made to provide for the following:

1. Some provision for the protection of stockholders against immediate repayment of any and all advances made by Garbutt, in the event of his death. All of the property of the Mutual Gold has been assigned to Mr. Garbutt and demand notes are being issued, due one day after date, for all advances and in the event of his death his representatives could demand immediate payment and Mutual Gold Company, unable to make such payments, would lose this property.

2. Adequate time within which to make repayment in the event that Garbutt elects to withdraw from further management, which right he has reserved, and he may withdraw at any time.

3. Some provision to pacify old creditors and note holders so that no suit, action or trouble will crop up in that respect.

4. Some additional protection with respect to the sale of the property so that same will not be sold without such offer of sale being submitted to the stockholders of Mutual Gold and authorized or ratified by at least a majority vote.

5. Provision to protect stockholders against suit or damage action with respect to tailings.

6. Itemized monthly statement of receipts and disbursements with usual monthly balance sheet.

7. Some provision for a small sum annually to

(Testimony of Joseph A. Vance.)

take care of the necessary overhead of the Mutual Gold, such as taxes, postage and office expense, all of the income at the present time going to Garbutt.

The Committee extended an invitation to Mr. Garbutt to be present at the Stockholders' meeting that these matters might be discussed with him personally, but he advised that he will be unable to attend and suggested that we take up with him, personally, matters which are bothering us, which we are now doing.

We feel that one of the things advisable to obtain these changes in the contract is to elect some new members to the Board. If you agree with us we will appreciate your signing and returning at once proxy enclosed herewith. The execution of this proxy will cancel any proxies previously given.

Very truly yours,

A. P. BATEHAM,

Chairman

Stockholders' Protective Committee

424 Symons Building,

Spokane, Washington.

APB:T

PROXY

Know All Men by These Presents: That I, the undersigned, do hereby constitute and appoint A. P. Bateman or R. P. Woodworth or Clarence Colby or ..... my true and lawful

(Testimony of Joseph A. Vance.)

attorney and proxy, with power of substitution, for me and in my name and behalf, to vote at any election of the stockholders of the Mutual Gold Corporation for directors or other purposes, occuring within seven months from the date hereof, and also to vote on any and all matters and questions which may be presented and considered at any annual or special meeting of the stockholders of the said Mutual Gold Corporation occurring within the said period, as fully and with like effect as I might or could have done if I had been personally present and voting thereat, and hereby revoke any and all proxies by me at any time heretofore given.

In witness whereof I have hereunto set my hand and seal the ..... day of January A. D. 1939.

..... (Seal)

Witness:

.....

[Sent with Fuson's letter of 1-2-40]

DEFENDANTS' EXHIBIT G

Spokane, Washington
September 13, 1938

Stockholders of Mutual Gold Corporation.

Gentlemen:

It is our understanding that you have not been furnished with a copy of the Garbutt contract to

(Testimony of Joseph A. Vance.)

be considered at the Stockholders' Meeting called for the 24th instant, and are, therefore, left completely in the dark in regard thereto, and are being asked to ratify, by proxy, something that you know nothing about.

We, as Stockholders of the Mutual Gold, therefore, after being fully advised in regard to said contract, as well as the Lloyd J. Vance proposed contract, believe it our duty to advise you that the Garbutt contract contemplates the immediate transfer of all of the assets which Mutual Gold now owns in exchange for stock in a new corporation to be formed by Garbutt, that the said contract is, in our opinion, woefully lacking in covenants binding the Garbutt corporation. To part with all of our holdings, as contemplated by the Garbutt contract, without binding such corporation to more definite performance is dangerous and might result very disastrously to the stockholders of the Mutual Gold. We are, therefore, definitely opposed to the Garbutt contract and believe that it should be rejected.

The offer of Lloyd J. Vance is, in our opinion, a better offer, more specific, definite and certain and should be given favorable consideration at the Stockholders' Meeting.

We earnestly request that you give this matter your serious consideration and if after such investigation you agree with us, it will be imperative that you instruct your proxy to vote against the Garbutt contract.

(Testimony of Joseph A. Vance.)

If you have already sent in your proxy without crossing out the name of Mr. Stiegler and inserting another name, and desire to vote against the Garbutt contract, we enclose a proxy herewith for your convenience, which should be signed and sent at once.

Very truly yours,
R. P. WOODWORTH
A. P. BATEHAM
A. F. McCLAINE

BARMAC PRODUCTION COMPANY
By A. F. McCLAINE,
President

INTERNATIONAL LAND COMPANY
By KENNETH G. LUKE,
President

ALFRED PAGE
ANNA E. HALL (Mrs. Dr. J. F. Hall)
ERICH T. RICHTER
HELEN L. HALFER
J. G. MATTHEWS, M.D.
C. H. COLBY
CHAS. P. JAEGER
MRS. F. O. ROSE
AVA B. COLBY

(Testimony of Joseph A. Vance.)

(Post Card addressed to)

Mr. A. P. Bateham,
424 Symons Block,
Spokane, Wash.

PROXY

Know All Men by These Presents that I, the undersigned, do hereby constitute and appoint A. P. Bateham or R. P. Woodworth or..... my true and lawful attorney to represent me at the Special Meeting of Stockholders' of Mutual Gold Corporation to be held on the 24th day of September, 1938, at eleven o'clock A. M., at the office of the Company, 401 Fernwell Building, Spokane, Washington, and I do hereby revoke any and all proxies by me heretofore given; and I do hereby direct my said proxy to vote against the Garbutt contract, and do hereby otherwise authorize and empower my said proxy to vote at said meeting and at any adjournment or adjournments thereof for me, and in my name and stead, upon the stock now standing in my name on the books of the said Company, hereby giving and granting unto my said attorneys, and each of them, full power of substitution and all the power that I should possess if personally present at such meetings.

(Testimony of Joseph A. Vance.)

Witness my signature this ..... day of September, 1938.

.....

Witnessed by:

.....

(Date, sign and mail at once)

DEFENDANTS' EXHIBIT H

4319 Latona Avenue
Seattle, Washington
September 17, 1938

To the Stockholders of Mutual Gold Corporation

Dear Stockholder:

We, the undersigned stockholders of the Mutual Gold Corporation, have read Mr. Stiegler's and Mr. Vance's letters and have studied the Garbutt Contract. We are opposed to Mr. Garbutt's contract as it is unfair and not to the best interests of the stockholders.

Since Mr. Bateham's and Mr. Woodworth's committee is opposed to the Garbutt Contract, we urge you to sign the enclosed proxy to them, if you haven't already signed one.

If you have signed a proxy to Mr. Stiegler, it

(Testimony of Joseph A. Vance.)

will be cancelled if you sign this proxy and date it.

Yours truly,

N. D. SHOWALTER, JR.
WALTER G. PEEBLES
LOUISE WOODWARD
W. B. CLIFTON
E. C. STAHLHUT

P. S. This proxy should be returned at your earliest convenience to the offices of Mutual Gold Corporation at 401 Fernwell Building, Spokane, Washington.

[Letter mailed to Stockholders (not at company's expense)]

DEFENDANTS' EXHIBIT I

Spokane, Washington
January 20, 1939

Stockholders Mutual Gold Corporation.

Dear Stockholder:

REPORT OF STOCKHOLDERS' PROTECTIVE COMMITTEE

You received notice of meeting called for September 24th, 1938, for the purpose of ratifying or refusing to ratify the Garbutt contract of September 2nd, 1938 (which had been approved by a majority of the Board subject to the ratification of the stock-

(Testimony of Joseph A. Vance.)

holders) which meeting was also called to consider and pass upon the offer of Lloyd J. Vance, or any other offer. Subsequently you received a letter from J. A. Vance, as General Manager, reporting on his management and analysing the Garbutt contract; and letters from various stockholders expressing their opposition to the Garbutt contract and requesting you, if you were not in favor of the Garbutt contract, to send in your proxies to some one who was not pledged to vote in favor of such contract.

Prior to this Stockholders' Meeting, however, the President called a special meeting of the Board to reconsider the action taken by the Board in the ratification of the Garbutt contract, and to consider any other proposal that might be brought before said meeting. At this meeting, which was held on September 19th, the Board ratified the Garbutt contract and cancelled the Stockholders' Meeting called for September 24th, and under date of September 20th notice of the ratification of the contract and cancellation of the meeting was sent to you by the President. On September 20th several stockholders also sent out a letter informing you of the action taken by the Board and advising that the meeting of Stockholders' would be held as called.

At the time fixed for this meeting, stockholders appeared for the purpose of holding the meeting, and requested the proxies which had been sent in for the meeting, specific demand being for the proxies which had been sent with the name of J. A.

(Testimony of Joseph A. Vance.)

Vance, R. P. Woodworth or A. P. Bateham therein designated as proxy. This demand was refused and, being unable to obtain such proxies, the meeting, only having the proxies which had been sent direct to Mr. Bateham, elected a Stockholders' Protective Committee for the purpose of taking such action as they might see fit to protect the interests of the stockholders' and creditors'.

Under date of September 30th Mr. Ferbert and Mr. Collins each wrote you, with what intent other than to air a personal grievance, we are unable to discern. We have no intention of taking sides in any personal animosities, nor to confer a dignity upon these letters which they do not deserve by answering them. That you may not be misled by anything contained therein, we call attention in passing, to the fact that Russell F. Collins resigned as President of the Board on November 24th, 1934. Mr. Vance was not elected as General Manager until August 22nd, 1936. The mill was built long prior to this and while Mr. Collins was President, and the flume was built by Mr. Horner, and proposed by Mr. Nelson, engineer in charge at that time—about September 1935.

Under date of September 26th, 1938 you received a letter from the President enclosing a so-called "Progress Report" signed by Frank A. Garbutt; and again under date of December 1st, 1938, you received a letter from the President enclosing "Progress Report" dated November 22nd, 1938,

(Testimony of Joseph A. Vance.)

signed by Mr. Garbutt. No comment is made in regard to these letters as you have copies thereof and can judge for yourself. Your attention is called, however, to the statement regarding the inadequacy of the mill in the first, and in the second that the old mill had been revamped at very little cost.

In between these dates, and on or about October 31st, 1938, an agreement was made and entered into between your corporation and Mr. Frank A. Garbutt, which recites:

> "Referring to that certain contract entered into with you on September 2nd, 1938, and again on September 22nd, 1938, I hereby withdraw from same as it is therein provided that I may do and I also elect to, and do hereby terminate my liability thereunder.
>
> "I (Garbutt) have fully performed my part of said contract to date and admit and agree that you likewise will have wholly performed said contract on your part as soon as you give me the security contemplated therein. * * *"

On or about November 1st, 1938, an agreement was entered into between the same parties, too long to set out in full, but among other things cancelling the contract referred to above, and agreeing that Mutual Gold Corporation should execute its notes due one day after date with interest at 6%, and that Garbutt may and shall hold title to the real and personal property heretofore conveyed to him by Mutual Gold Corporation, in trust as security for

(Testimony of Joseph A. Vance.)

the payment of said notes, and further providing that should the Mutual Gold Corporation organize a new corporation to take over and hold said property (the property transferred to Garbutt as security for money advanced by him) that Garbutt will transfer said property to such new corporation and in exchange therefor is to receive as security for his said notes all of the stock of such new corporation.

This seems to bear out the statement which we made to you in regard to this contract of September 2nd, that it contained no binding obligations of any kind on Mr. Garbutt.

While the contract of September 2nd indicated that itemized monthly statements would be made to Mutual Gold Corporation, such information does not seem to be available at the office of the Company. The last trial balance sheet available is for the month of September 1938. Expenditures seem to be mounting rapidly and fantastically, far above estimates, with no detailed information in that regard, and the old mill still on the job.

We understand that a new contract has been executed by Mutual Gold Corporation and sent to Garbutt for execution, but that same has not been executed by him. Is this contract held up advisedly so that no comment may be made thereon and the stockholders kept in the dark in regard thereto?

We are advised that the Annual Meeting of the Stockholders will be held at the office of the Com-

(Testimony of Joseph A. Vance.)

pany on February 1st, 1939, for the election of a Board of Directors and, presumably, for other purposes, notice of which you will, undoubtedly, receive prior to the receipt of this letter. We also assume that such notice will be accompanied by a proxy made out to some member of the Board of Directors.

What is to become of Mutual Gold Stockholders in the event of Garbutt's death, all of his demand notes become immediately due and payable? Don't you think that some effort should be made to protect the stockholders of Mutual Gold in such event? We believe that some provision can be made in this and other respects to better protect the interest of the stockholders, and that some change in the Board of Directors is desirable, that some effort may be made to effect such changes.

We are enclosing herewith, for your use, blank form of proxy, should you feel that our efforts in your behalf are worthy of your consideration. The address on this proxy is made to my office so that the Board will not be able to withhold delivery or inspection thereof, as they did at the last meeting. This proxy will cancel other proxies that may have been previously given.

Very truly yours,

A. P. BATEHAM,

Chairman

Stockholders' Protective Committee

424 Symons Building,

Spokane, Washington.

(Testimony of Joseph A. Vance.)

Mr. Hinckle: Are you willing to stipulate that an agreement dated August 23, 1939, executed by the Mutual Gold Corporation, Frank A. Garbutt, and the Log Cabin Mines Company, was executed by the various parties and delivered?

Mr. Abel: I will do so on one condition, and that is that it was not signed by Mr. Stiegler until the day before the Spokane trial commenced, which was in the fall in 1939.

Mr. Hinckle: Is that true, Mr. Stiegler?

Mr. Abel: Mr. Stiegler testified. That was produced and it was a surprise to us when it was produced and he testified.

Mr. Hinckle: That is true, is it?

Mr. Stiegler: I couldn't hear.

Mr. Hinckle: Did you sign this agreement of August 23rd, a supplemental agreement, providing for taking care of the creditors of the Mutual Gold? Did you sign that just a day before the trial at Spokane?

Mr. Stiegler: I don't recall now just when I did sign it but——

Mr. Hinckle: About that time?

Mr. Stiegler: About that time; yes, sir.

Mr. Hinckle: Very well, I offer it on that statement. [344]

The Clerk: Exhibit J. [345]

(Testimony of Joseph A. Vance.)

DEFENDANTS' EXHIBIT J

This Agreement, made and entered into this 23rd day of August, 1939, by and betweeen Mutual Gold Corporation, a corporation, party of the first part, Frank A. Garbutt, party of the second part, and Log Cabin Mines Company, a corporation, party of the third part, Witnesseth:

That Whereas, the parties hereto entered into a written agreement dated the 17th day of December, 1938, relative to the Log Cabin group of mines and mining claims, located near Leevining, Mono County, California, and which was held by first party under a certain contract of purchase from the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, dated July 13, 1932, and which said contract was later modified; and

Whereas, the party of the first part conveyed all of its right, title and interest in and to said contract, as modified, to the party of the third part herein, together with other claims and property owned by party of the first part; and

Whereas, as of the date of said contract, December 17, 1938, between the parties hereto, party of the first part was and still is indebted to divers and sundry persons and corporations for advances made to party of the first part, and in addition thereto had issued production notes aggregating $31,807, and which said production notes are now outstanding; and

(Testimony of Joseph A. Vance.)

Whereas, the party of the first part is desirous of amending said contract of December 17, 1938, between the parties hereto; and

Whereas, the parties of the second and third part are willing that the same be amended in certain particulars;

Now therefore, it is mutually agreed by and between the parties hereto that said contract dated the 17th day of December, 1938, between the parties hereto, shall be amended as hereinafter set out, but that said contract shall in all other particulars stand as originally made, to-wit:

That after the full and complete payment, settlement and satisfaction of the following items, to-wit:

(1) The entire balance unpaid upon said contract covering said Log Cabin group of mines and mining claims, between party of the first part and Chandis Securities Company, M. N. Clark and Alice Clark Ryan, dated July 13, 1932, as modified;

(2) The payment of all sums now due and owing and which may hereafter become due and owing by the party of the third part in the course of its operations, including any sums now due and owing and which may hereafter become due and owing from the party of the third part to the party of the second part under the terms of said contract dated December 17, 1938, or otherwise; and

(3) The setting up of sufficient working capital by the party of the third part to prop-

(Testimony of Joseph A. Vance.)

erly and efficiently conduct its business and operate said mining claims covered by said contract dated July 13, 1932, as modified, and all claims transferred and conveyed by party of the first part herein to party of the third part herein;

one-half of the net proceeds of production from said mining property, after deducting all income taxes or taxes which may become due and owing thereon to any Governmental body whatsoever, including the State of California and the United States of America, shall be paid by the party of the third part to the party of the first part, until all obligations due and owing by the party of the first part to its creditors on the 17th day of December, 1938, with accrued interest thereon, if any, together with the sum of $10,000 advanced by the party of the second part to the party of the first part and the party of the third part for the liability of the party of the first part to the party of the third part for its subscription to the entire capital stock of the party of the third part in the sum of $10,000, shall have first been fully paid, and, second, said production notes aggregating $31,807 shall likewise be fully paid. As one of the considerations for permitting one-half of the said net proceeds of production of said mining property, as hereinbefore provided, to be paid by the party of the third part to the party of the first part, it is hereby agreed that the party of the second part

(Testimony of Joseph A. Vance.)

shall similarly be entitled to payment to him by the party of the third part of the remaining one-half of the net proceeds of production from said mining property, after deducting all income taxes or taxes which may become due and owing thereon to any Governmental body whatsoever, including the State of California and the United States of America, up to, but not exceeding, such amount as shall be paid hereunder by the party of the third part to the party of the first part.

That in the event of the sale or other disposition of said mining property by the party of the third part, after the payment of items numbered (1) and (2) hereinbefore set out, one-half of the remaining proceeds of the purchase price, after the deduction of all income taxes or taxes which may be due and owing thereon to any Governmental body whatsoever, including the State of California and the United States of America, and all costs of said sale, to the extent necessary to take care of, first, said obligations of the party of the first part as of December 17, 1938, with accrued interest thereon, if any, and, second, said production notes aggregating $31,807, shall be paid by party of the third part to party of the first part, so that said obligations may be fully paid and satisfied by the party of the first part; and the remaining one-half of the proceeds of the purchase price, to an amount equal to that paid to the party of the first part by the party of the third part, shall be paid by party of the third part to the party of the second part.

(Testimony of Joseph A. Vance.)

That nothing herein contained shall be construed as limiting or modifying in any particular whatsoever any of the rights which either of the parties of the second and third part may or shall have or be entitled to pursue under said contract of December 17, 1938, by and between the parties hereto.

Anything herein to the contrary notwithstanding, it is hereby agreed that it shall be optional with the party of the third part to include the said sum of $10,000 advanced to the party of the first part by the party of the second part for the purchase of capital stock of the party of the third part, as hereinbefore set out, as a portion of the advances to be made by the party of the second part herein under the said agreement of December 17, 1938, between the parties hereto, for the protection and development of said mining property and the property covered by said contract and for said equipment; it being the verbal understanding of the parties at the time the said advance of $10,000 was made, that the same might be so included as a portion of said advances under said contract of December 17, 1938.

In witness whereof, the parties hereto have duly executed this instrument on the day and year in this agreement first above written.

(Seal) MUTUAL GOLD CORPORATION

By J. E. STIEGLER

President

Attest: E. T. ORR

Secretary

Party of the First Part

FRANK A. GARBUTT
Party of the Second Part

(Seal) LOG CABIN MINES COMPANY
By S. C. HALL
President

Attest: CHAS. F. HATHAWAY
Secretary
Party of the Third Part

A. R. CARTER,

called as a witness on behalf of defendant, having been previously duly sworn, was examined and testified as follows:

Q. By Mr. Hinckle: How much money, Mr. Carter, has been received from the sale of gold and silver recovered from the mine since Mr. Garbutt has been operating it?

A. $286,962.96.

Q. What has been done with this money?

A. Well, most of it has been spent for the operations [346] of the mine. There is a small amount on hand at the present time, about $3,000 or $4,000.

Q. You say most of it has been spent for that. What has the rest of it been spent for?

A. With the exception of the $3,000 or $4,000 which is on hand at the present time.

Q. How much money has Mr. Garbutt received out of the returns from the mine, if any? [347]

A. He has not received any money. [352]

(Testimony of A. R. Carter.)

Q. By the Court: Has the Log Cabin paid any dividends? A. No, sir.

Q. Have you made up a statement showing profit and loss?

A. I made up an income tax statement to the federal government showing all the profit and losses at the end of 1940, also one at the end of 1939.

Mr. Hinckle: They are in evidence, I believe, your Honor.

A. The statements have been filed with the federal government.

Q. Then, as I understand your testimony, generally speaking, that the mine has been operated and about $286,000 taken out of it and it has not shown any profit?

A. No; it has not, figuring depreciation and depletion.

Q. Well, you have not paid the payments to the Securities Company, either, have you?

A. They have not made the payment on the contract to purchase.

Q. Why not?

A. That I don't know. I only know from what records that I have. I don't know why it has not been. In the [354] first place, we haven't enough cash on hand to pay it. [355]

Mr. Hinckle: Is there any objection to having a total figure given as to the amount of money that Mr. Garbutt has personally advanced, inasmuch as the contract required him to advance certain moneys?

(Testimony of A. R. Carter.)

The Court: I think that is proper.

Mr. Anderson: Subject to our objection, your Honor.

The Court: And subject to your objection.

The Witness: Is that the question?

Q. By Mr. Hinckle: Just what is the total of these advances? And then that will be checked up and proved by the later accounting.

A. $133,956.20.

Q. Does that include the $10,000 that he loaned to Mutual Gold to buy Log Cabin's stock?

A. Yes; $10,000 of that went to Mutual.

Q. Have you any other itemization that you can give offhand at this time?

A. The balance of it went to buy machinery and to buy supplies for the mine.

Q. How much went for machinery?

A. Do you want me to give you that in a total figure or——

A. A total figure. [359]

A. $127,876.17.

Q. By Mr. Hinckle: That is for machinery?

A. Machinery.

Q. By Mr. Hinckle: Subject to correction of the various calculations, how much money has been paid to the owners since Mr. Garbutt has taken over the operation? A. $23,500.

Q. Do you know how much had been paid in the six years prior to that that the contract had been in operation? A. I do not.

(Testimony of A. R. Carter.)

Q. Has Mr. Garbutt received any interest on the money he has advanced? A. He has not.

Q. Has he received any dividends of any kind?

A. He has not.

Q. Has he been paid anything for his services? [360]

A. He has not.

Q. I believe you have already testified that the Log Cabin Mines Company, the corporation, has not made any profits out of this?

A. No; they have not made any profit. [361]

FRANK A. GARBUTT,

a defendant herein, recalled as a witness in behalf of defendants, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. What was the first incident or transaction in connection with the making of the contract of September the 2nd, 1938, that you recall?

The Court: I would suggest that counsel come over closer to the witness so that both of you will not be under a constant strain.

A. Mr. Collins came to my office in Los Angeles and hung around there for about two weeks. He had access, he had entree to the office. I had known him in these transactions for six or seven years. He sought opportunity to talk to me about going into the property with them, which I declined.

(Testimony of Frank A. Garbutt.)

Finally, at his solicitations, I told him I would try to find a party for them. He was very anxious to make some kind of a contract to do what he called "getting them out of Mr. Vance's clutches," and he brought with him Mr. M. J. Keily, a former em-

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ployee of mine. Mr. Keily worked for me as mining superintendent for 17 years without missing a pay day at $300 a month and expenses; and I had a lot of confidence in Mr. Keily. When I retired from mining seven or eight years before, Mr. Keily got some mining property of his own, and at my suggestion—they asked me for a good man at some time or other—and I told them Mr. Keily might give them advisory work of some kind and they employed him at $200 a month to work up there for them. And in that way I had some contact with the mine, which I was anxious to have on account of the owners whom I was representing.

Q. Did you make a contract at that time, or did they come back later? What was the next incident in connection with the making of that contract?

A. The next step was that I endeavored to find somebody that would be responsible and that would be willing to put some money in the property and help them carry it on.

Q. Whom did you contact?

A. I contacted Mr. Cecil B. De Mille, a former associate of mine in the motion picture business.

Q. Did you contact anybody else?

(Testimony of Frank A. Garbutt.)

A. Later on, I contacted Mr. Hal Roach, another friend. I picked them out because I thought they would have easy money.

Mr. Abel: I object to this as argument.

Q. By Mr. Hinckle: No contract was made with them, is that correct? [372]

A. I brought Mr. Keily in contact with Mr. C. B. De Mille, and he took him down on his yacht. I went with them. And they talked about the matter at some length. About that time or shortly thereafter, Mr. De Mille discovered that there was a lawsuit in the offing and he declined to discuss the matter further.

Q. Do you remember why the contract of September the 2nd—withdraw that. Did any other people come down from Seattle or up north to see you about the making of a contract before one was made?

A. Yes. Mr. Ferbert, I think Mr. Stiegler, I think Mr. Grill, in addition to Mr. Russell Collins. Mr. Russell Collins and his brother were the ones who negotiated the original contract of 1932; and I had become pretty well acquainted with them during the dealings, the subsequent dealings.

Q. Did they come down at your solicitation?

A. No.

Mr. Abel: To avoid any misapprehension, Mr. Collins' brother died several years earlier?

A. He died several years earlier, and he was the one I knew the best. I became acquainted with Mr. Russell Collins after that. But this thing started in

(Testimony of Frank A. Garbutt.)

this way: This mine belonged to a friend of mine, Mr. Harry Chandler, and another friend, Mr. Harry

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Clark. It formerly belonged to an acquaintance of mine, Mr. Luther Brown. And when Mr. Clark died it left Mr. Chandler with half of this property and Mrs. Alice Clark Ryan, Mr. Clark's daughter, the owner of the other half; and they asked me, or Mr. Chandler did, if I would undertake——

I undertook the sale of it for them, without any recompense to me, and I submitted the property or showed it to people and tried to sell it over a considerable period of time. Three or four other concerns, whose names I forget—one was United Verdi Consolidated—and they made an examination of it and they would not pay anything for it.

Now, my theory of selling a mine, your Honor——

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The Court: Let us not go into that, Mr. Garbutt, your theory of selling a mine.

Q. By the Court: When it was sold had there been any development work done?

A. Yes. The best ore in the property had been developed by the Simpson brothers and Mr. Clark. That was on the 125 level. One of the conditions of this contract was that they should not mine that ore; that they should keep it preserved and intact so it could be shown—it was the show window of the mine—until they got some other ore.

Mr. Anderson: May I ask what contract that was? You said "this contract".

(Testimony of Frank A. Garbutt.)

A. That is the contract of '32, I believe. And I wrote that contract and put those provisions in there; and my reason was I didn't want—— [375]

Q. By Mr. Hinckle: After the second trip down, or the trip that you have just described which was attended by or which was made by Mr. Stiegler and others, was your contract then made?

A. Yes; we made the contract of September 2nd after some negotiations.

Q. Why then was another one executed on September 22nd, if you know?

A. I don't know that I know the reason that was executed. It was apparently identical. I think it had something to do with authority of the Mutual [376]
to sign it, but I am not certain as to that. I have no independent recollection.

Q. About the time the first contract was signed or a little before, a few days before that, a notice of cancellation or termination was given by you, as agent for the owners, was it not? A. Yes.

Q. Why was that given?

A. I had just become aware of the fact that the Mutual had allowed this 125-foot level, which was the best level on the mine—was and is—had been allowed to cave. Their contract called for it to be completely protected at all times and kept accessible. I had just learned that had been allowed to cave and was inaccessible and would cost as much again or more than it did originally. It was brought to my attention rather forcibly that they had not

(Testimony of Frank A. Garbutt.)

impounded the tailings, as had been agreed, but had run some $6,000 or $7,000 worth of tailings out on the hillside where they had become a liability, washed down on Mrs. Cunningham, the keeper of Tioga Lodge, and that she had some claims against them for damages. The tailings were lost or wasted. And there were several other important breaches of contract that ought to be cured. And in writing that notice, in sending that notice, I had in mind bringing them in and having them agree to cure those defaults and see that they did so. [377]

Q. Did you open up the tunnel which had caved after you took charge?

A. We did later on, most of it. Not all of it is opened yet.

Q. Was that an expensive proceeding?

A. Very expensive. It cost more than the original driving of the drift. That is one of the reasons for the showing that we made.

Q. Why did you withdraw from the contract, the September contract?

A. Well, there was several reasons.

Q. Well, name them. Name those that you recall, if you will, please.

A. Well, one reason was wholly personal. My tax adviser, Mr. Mark Mitchell, went over the contract with me in connection with some income tax matters; and he advised me that, while probably it would take no tax, it was a question and a rather close one. And he said, "That contract may cost

(Testimony of Frank A. Garbutt.)

you a very severe income tax and I advise that you withdraw from it." I explained the importance of it, or lack of importance; and that was one reason. Another reason was, at the time that I made this contract I had seen the mine for two or three hours only. I was familiar with the difficulties they had had with Mrs. Cunningham over their tailings and had seen the tailings on the side hill where they [378]

had been scattered, and I thought that liability was so—not only on anybody who made a contract, but also upon the owners if they got possession of the property back—and I told Mutual during our negotiations that I would not touch those tailings with a ten-foot pole; and that the only way I would go into the thing at all would be if they retained the tailings, retained ownership of them and retained their control of the surface of the ground on which they were; and that was left out of the contract. On the other hand, Mr. Collins had an idea that all of those tailings would go down on Mrs. Cunningham the next year and cause very serious damage which might run into a good many thousand dollars. I didn't think so, but they wanted to protect the Mutual against that liability, and a part of the expense that I had to go to was to furnish the money to build an eight-inch line two or three miles down to a small tailings dump they had, so that when the spring run-off came they could move those tailings. I agreed with Mutual that I would help them out

(Testimony of Frank A. Garbutt.)

with those tailings all that I could, without having any liability or any duty to do so, and we arranged that I should advance that money to such men as Mr. Collins wanted to use up there for that purpose, but on the Mutual payroll and not on mine. This was when I was operating the thing myself under a contract with me; but that he should do those things if he wanted to, but that I would not. I employed Mr. Collins because the Mutual wanted

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a representative on the ground. He had been director or was at that time a director of the company, and I agreed to employ him and pay him at the expense of the operating company or of myself, but that he should report direct to the Mutual so that they would have full information of whatever was being done.

Now, I wrote a letter—this situation became acute, and I wrote a letter to Mr. Collins, to Mr. Haley and to Mr. Sturgeon, Haley being their mill man and Sturgeon being their underground foreman, giving them positive orders that they were not to touch those tailings; they were then on my payroll and working for me, and they were not to touch those tailings; and I asked them to send me back an acknowledgment of the receipt of that letter, that they understood it and would obey the orders. Instead of doing that, I am told by Mr. Collins——

Mr. Anderson: I object to that——

A. By Mr. Collins that they held a meeting and

(Testimony of Frank A. Garbutt.)

decided they would not obey that order. I didn't learn that until eight or ten days later, when Mr. Collins came into my office unexpectedly. At that time I knew if they disobeyed that order they would make me liable on my payroll; so I discharged Mr. Collins and I wrote a letter immediately—a letter, or a wire I guess it was—to Haley and Sturgeon, saying, "Please sign the acknowledgment of that letter and send it to me by return mail," which was done. Now, Mr. Collins could do whatever he pleased as representative of the Mutual, but I wanted him

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to do nothing with those tailings as my representative or as my employe, and I wanted the other men exactly the same way; and that is the time when I withdrew from the contract, but my real reason, the underlying reason, was the effect it might have on my income taxes.

Q. By Mr. Hinckle: Mr. Garbutt, did you pay any money to Mr. Collins to get him to work for you in order to obtain this contract of September?

A. No.

Q. Did you pay any money to anybody else for that purpose? A. No.

Q. Did you want the contract? A. No, sir.

Q. Why did you enter into it?

A. Well, by that time I saw or thought I saw

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that the Mutual was in rather bad shape. I felt very friendly to Mr. Collins and had started to get

(Testimony of Frank A. Garbutt.)

them a party interested. At that time, why, Mr. Abel was threatening suit or trying to bluff me, and I made up my mind that I would see him through and do the best I could to save—he had some 700 stockholders that Mr. Collins had gotten a great many of them; they were small stockholders; they were broke; and I wanted to help them out. I thought I could do it and keep even, perhaps, until I could get some person in my place. I never intended to get the contract, never would have done it had it been free. I thought I could enlist someone else on my terms and withdraw. That was my intention always.

Q. The notice of forfeiture was withdrawn October 15th. Why was that withdrawn?

A. Well, that was withdrawn because the owners became assured that a contract had been made which would cure those defaults and would protect the property. [382]

Q. The contract of December 17, 1938, was made [383] here in Los Angeles, or was it made in Seattle or where was it made?

A. I think it was agreed on here in Los Angeles.

Q. Who drew the contract, if you know?

A. Mr. Grill: I have to explain there and get the continuity of this thing. I am sure I will have to, if your Honor will bear with me just a moment or two.

The Court: Let him explain.

Mr. Hinckle: All right. Subject to——

(Testimony of Frank A. Garbutt.)

A. When I withdrew I agreed with Mr. Grill and the other directors of the Mutual that I would keep on furnishing money and allow them to carry on until they could find a person to take my place. It was the only thing they really could do. The thing was in operation when I withdrew, and the only fair thing I could do. So then they kept after me to make another contract, which I didn't want to make, and Mr. Grill drew that contract, negotiated it, I think, with some of the other directors, and finally that contract was signed for that reason.

Q. By Mr. Abel: Which contract are you speaking of?

A. I am speaking now of the contract of December 17th.

Q. By the Court: Do you know when you signed that? A. Sir?

Q. Do you know when you signed it?

A. On or about December 17th. It was dated—this was written by Mr. Grill, dated, I believe, by him in his [384] handwriting, and sent to me in due course.

Q. It was dated when you received it?

A. I think so. I am not certain of that, your Honor.

Q. You do not know the date, though that you actually signed it?

A. I don't know the exact date. It probably was a day or two later. I am not certain.

(Testimony of Frank A. Garbutt.)

Q. By Mr. Hinckle: Did you fill in that at the top? A. No.

Q. "December 17"?

A. That was filled in in Mr. Grill's handwriting, I believe.

Q. The minutes introduced of the Log Cabin Mines Company, introduced in evidence by the plaintiffs, show that the Log Cabin board of directors authorized the signing of that contract on January the 4th. Did you sign it after the Log Cabin signed it or before?

A. Before, I am sure. In regard to that matter, Mr. Hinckle, all those things were referred to you and I very seldom looked at them.

Q. Do you know when you transmitted the contract to him? I will withdraw that. After the contract was executed by you and the Log Cabin did you transmit it, or at least a copy of it, to Mutual or to some one for the Mutual?

A. My recollection is—and I am not certain of it— [385] that we had a contract drawn by Mr. Grill that was very much interlined or mutilated and that that was signed, and that afterwards he prepared these clean copies and sent them down for signature, but I am not certain of that. That is my recollection.

Q. When the clean copy was signed which the Judge put in evidence, or asked to have introduced in evidence this morning, did you transmit a copy of that to the Mutual or to someone for the Mutual?

(Testimony of Frank A. Garbutt.)

A. I think so.

Q. And do you remember how you transmitted it? A. Well, it would be by letter.

Q. I will show you here a carbon copy of a letter dated "January 12, 1939," addressed to "Mr. Wm. L. Grill, Air Mail", and signed "Frank A. Garbutt", and ask you if that is a copy of a letter that you sent with the executed final copy to the Mutual. A. Yes.

Mr. Hinckle: I offer that in evidence as Defendants' next exhibit.

Mr. Abel: I have no objection to its being a copy, if I might see it, about its being a copy, if I may see it. No objection.

The Clerk: Exhibit L.

DEFENDANTS' EXHIBIT L

January 12, 1939.

Mr. Wm L. Grill,
Colman Building,
Seattle, Wash.

Air Mail

Dear Mr. Grill:

I am enclosing you herewith two additional original copies of the agreement of December 17th, one of which has been executed by the Log Cabin Mines Company and by me. It should be executed also by

(Testimony of Frank A. Garbutt.)

the Mutual Gold Corporation, after which you are at liberty to keep it for your purposes, the same as the copy you already have.

The other copy I would like to have executed by the Mutual Gold Corporation and returned to me for my files, one of the two copies I will then have being for delivery to the Log Cabin Mines Company.

With kind regards, I am

Yours sincerely,

FRANK A. GARBUTT.

FAG-C.

Enc.

The Court: Defendants' next in order.

Q. By Mr. Hinckle: What equipment have you placed on [386] the property since you have been there?

A. In a general way, a Marcy bail mill, a Doer classifier, Clark-Todd amalgamator.

The Reporter: Will you repeat the last, please?

A. Clark-Todd amalgamator. That is the amalgamator that they use at the Homestake Mining Company.

Q. By the Court: What is the trouble with that mine up there? With that amount of money taken out, why have there been no profits?

A. It is not the amount of money they take out, your Honor. It is what it costs you.

(Testimony of Frank A. Garbutt.)

The Court: I know, but what is the trouble?

A. Well, low-grade ore and difficulties of various kinds. For example, we had the money accumulated to make this payment on November 1st; and I had told the owners that it would be forthcoming, when the mine commenced to fall in on us due to water that had seeped into the property, into the formation, from the previous spring thaw when the snow thawed and the ground was not frozen. It didn't make its effect manifest for some months afterwards; and we had to use all the money we had and all the men we could get to save the property from becoming practically a total loss; and that money was used up for that purpose and additional money borrowed to timber and pay for our winter supplies. [387]

The date of the caves ran over a period of weeks, I think, a month or two. It was in the late fall of 1940 and it was pretty general all over the mine. [388]

Q. By Mr. Hinckle: Did you hire any extra men to take care of this caving-in situation?

A. We turned all our crew into that and hired a few, all that there was a place for to work.

Q. You had to temporarily stop mining for the production of ore?

A. It interfered with it very much. We did not stop entirely. We kept going as best we could.

Q. By the Court: How much ore are you putting through the mill now?

(Testimony of Frank A. Garbutt.)

A. That depends, your Honor. We have had during the winter time snow there as deep as 20 feet, sometimes covering our building. We aim to put through 100 to 110 tons when we can get it, and we come as near that as we [389] possibly can. This mine was mined by the Simpson boys, then by Mr. Chandler and Mr. Clark, then by the Mutual, and between them they spent there $300,000 or more. This $300,000 was their last attempt with that old mill that did not even comply with the terms of the contract that they build a proper mill to mill the ore. The expenses of milling with that mill ran about $8.50 a ton.

Q. By the Court: May I ask what is the prospect in the future for that mine?

A. Not too good. It has some possibilities. I can give you all that in detail, with exact data. And in that information that Mr. Abel didn't want me to read yesterday you will find, I think, exact figures that will answer most of those questions; and they are not based on opinions or hearsay; they are based on actual money figures.

Q. By the Court: You have been operating it—— [390] A. About two years, I guess.

Q. —about two years, and it has not shown any net profit?

A. Well, according to the income tax statements. According to my ideas, it would show some profit, a small profit, and it should have shown a little bit

(Testimony of Frank A. Garbutt.)

more; but the regulations are such that you have to charge to capital charges things which are necessary for the operation and which really have no capital value of any kind; and that would explain a little of it. I know the detail of the operation.

Q. Supposing you have another two years' operation, are you going to be any better off than in the last two years?

A. I can't tell you that. I can explain to you the reasons that bear on it, but I can't answer that question or nobody else.

Q. Has the ore held up in value?

A. No. In fact, the ore never did have the value that this—what's the name?—Cole's report indicated, neither the value nor the quantity. [391]

Q. By Mr. Hinckle: What are the ore values that you have been taking out?

A. They have run along in the neighborhood of on an average of $5.40 or thereabouts.

Q. And what is about your average cost of recovering those values?

A. If you leave out the bad luck we have had and things of that kind, I would say that I ought to mine and mill it and handle it, all told, for about $3.75; but it has been costing us a little more than that, sometimes more than $4 and sometimes quite a little bit more than $4. [393]

Q. What is your estimate of the number of tons of available ore in the mine now?

(Testimony of Frank A. Garbutt.)

A. Well, I have no estimate of what there is now. I know what there was at the time I took charge of it.

Q. All right. What is your estimate at that time?

A. There was about sixty-four or five thousand tons of ore in the mine; but that should not be characterized as ore that was blocked out because none of it was, strictly [404] speaking, blocked out. [405]

Q. By Mr. Hinckle: How much of an error do you say that Mr. Cole had on his valuation of a million six hundred and some thousand?

A. Well, I would think there would be in there at that time about not to exceed $400,0000 gross * * *.

Q. What percentage of recovery do you make with your new mill?

A. Well, our recovery has varied from 65 to as high as about 80 per cent by amalgamation.

Q. By Mr. Hinckle: You do not use any other kind of recovery? A. No. [426]

Q. By the Court: You did not put in a cyanide plant?

A. No, sir. I would like to go into the reasons of that if I may.

The Court: I am not concerned.

Q. By Mr. Hinckle: I will ask you why you did not. Why didn't you put in a cyanide plant?

A. Because after figuring it from every angle,

(Testimony of Frank A. Garbutt.)

testing it for a good many months in connection with the Dorr Company, the biggest authorities on cyanide and the biggest manufacturers of cyanide machinery in the world, we came to the conclusion that it would not pay with the ore we had in sight; and we were on a ridge that was directly between two streams used for drinking water, one a city and one a resort, and there was a great many uncertainties and expenses in taking care of that cyanide, and it would not pay. The cyanide process, you can save anything you want up to about 99 per cent, and that dependent upon the excellence of your plant and the completion of it; but a cyanide plant such as this mill and mine should have and be adapted to the milling of this ore, would cost, if properly installed, about $125,000 for the cyanide plant alone, not including the other milling machinery, which would be your crushing and grinding machinery and the items that go with it. [427]

Q. By Mr. Hinckle: In your opinion, is your new mill now an efficient mill?

A. Yes; it is an efficient mill in so far as our present operations are concerned and in so far as amalgamation is concerned. We would undoubtedly save a materially larger amount of gold by cyanide, which is an ideal process for this ore; but it would cost us, including the depreciation charges and the tax and insurance on the mill, about as much as it would come to; and when we got through with the ore that we now have available we would not

(Testimony of Frank A. Garbutt.)

have the mill paid for and would be still more hopelessly in debt.

Q. Mr. Garbutt, your contract of November the 1st, 1938, terminating your September contract, I believe [428] provided that you could take a first lien on the property to secure your advances. Have you done that?

A. I didn't think it had it and I have never thought of it since.

Q. It also provides, I believe, that you had the right to have the 4,099 shares of the Log Cabin stock pledged to you to secure your advances. Has that been done? A. No; that was never done.

Q. Where is the stock now?

A. Well, I don't know. You put it away somewhere. I think it is in escrow with the Citizens Bank under order of the State Corporation Commissioner.

Q. That same contract, as I recall it, provides that you should take demand notes. Have you ever taken any demand notes?

A. No. That provision was made because the company was scared to death of some Vance suits and was to enable me to protect myself in the event he started to foreclose. I never took it and never had any idea of taking it.

Q. Did you assign whatever interest you had in the mines, as trustee or otherwise, to the Log Cabin Mines Company?

(Testimony of Frank A. Garbutt.)

A. Yes; on direction of the Mutual——

Mr. Abel: I object to this as not responsive.

Q. By Mr. Hinckle: Is this the assignment that you executed? [429]

A. I have never seen it since. Yes.

Mr. Hinckle: I offer that at this time as defendants' exhibit.

Mr. Abel: What date was that?

Mr. Hinckle: March the 10th, 1939.

The Clerk: Exhibit O.

Mr. Abel: What exhibit?

The Clerk: Exhibit O.

DEFENDANTS' EXHIBIT O

ASSIGNMENT OF CONTRACT

For value received, I hereby sell, assign, transfer, set over, and convey to Log Cabin Mines Company, a California corporation, all my right, title, and interest in and to that certain contract dated July 13, 1932 between Chandis Securities Company, M. N. Clark, and Alice Clark Ryan, as sellers, and Russell F. Collins and Ben L. Collins, as buyers, together with all modifications and agreements supplemental thereto.

In witness whereof I have set my hand hereunto on this tenth day of March, 1939.

FRANK A GARBUTT

Witness.

(Testimony of Frank A. Garbutt.)

Q. By Mr. Hinckle: Do you represent the owners as an agent now? A. No, sir.

Q. When did you cease to represent them as an agent?

A. I think it was about November 3rd, two or three days after this contract was made of November 1st. I am sure of that.

Q. You have not represented them since that time, have you? A. No, sir.

Q. How much time, about, have you put in of your own on this enterprise?

A. That is a headache. About four or five hours a day, sometimes more.

Q. Have you made any charge for that service?

A. No.

Q. Are you willing at this time to turn the property back on certain conditions? [430]

A. I always was. I am now; yes.

Q. What are the conditions that you are willing to turn it back to them on?

A. The conditions are and were that it would go into somebody's hands who would make a bargain that would protect the Mutual stockholders, and especially the minority stockholders, and that would be satisfactory to the owners.

Q. What about the money you have put into it?

A. Well, at one time they suggested—Mr. Abel suggested——

Mr. Abel: Just a minute. That is not responsive.

(Testimony of Frank A. Garbutt.)

The Court: That is not the question he asked. Just read the question, Mr. Reporter.

(Question read by the reporter.)

Q. By Mr. Hinckle: I mean by that, what condition would you make as to the money you had put into it?

A. Pay it to me back in any reasonable way.

Q. You would not want it all cash?

A. Oh, no.

Q. How much cash would you ask?

A. I would say about half and the balance distributed over some reasonable time. [431]

Cross Examination

Q. By Mr. Grill: Mr. Garbutt, what has been done with the tailings from the mill from your operations?

A. The tailings from my operation have been pumped through a series of four Woolfley sand pumps from the mill to a point up on top of the hill where they can be impounded and stored with some reasonable degree of safety, and not exposed on the sidehill where they are subject to a cloud-[432] burst.

Q. Can they be reworked or reused at some future date? A. Oh, yes.

Q. They are impounded and can be used?

A. Yes; if ever you got enough of them there to pay, or to figure out an operation that would pay. They are available and the only additional cost

(Testimony of Frank A. Garbutt.)

would be—they had to be pumped, in any event—the only additional cost of working them would be the cost of scraping them up, which would be something less than 10 cents a ton. [433]

Q. Did you make a return to Mutual Gold of your operations up to date of termination of the contract? A. What do you mean by a return?

Q. Make any statement or report of this property?

A. I reported to them at all times about all of my operations.

Q. But there was no terminal date October 31st. Did you make any statement of account up to that date?

A. Whatever statements they wanted I sent them, almost daily copies of our routine correspondence. [442]

Q. How much had you expended up to that time? A. I don't know.

Q. Well, concerning the initial outlay of $500 for the power line, what date did you put that money up?

A. It was some time before the contract was signed. In discussion with them they decided——

Q. Well, what time? How many days before?

A. Oh, I would imagine a couple of weeks. I don't know. I can tell you the reason of it without—

Q. Well, the contract was signed on September 2nd?

(Testimony of Frank A. Garbutt.)

A. Yes. This was some time previous to that time.

Q. Say, about two weeks before?

A. Well, it might have been a month before. I don't know. [443]

Q. By Mr. Abel: Mr. Garbutt, do you testify that the Log Cabin Mines Company has milled 50,000 tons of ore from [444] this mine?

A. In that neighborhood, I think. It may be that is the amount in toto—I don't know—from the start.

Q. And you estimate that there remains developed, but not blocked out, about 60,000 tons?

A. No. What I said was that there was about 63,000 or 64,000 tons there of probable ore at the time that I took over.

Q. Have you had any estimate or survey made to determine the amount of probable ore with reference to this trial?

A. You mean that there is now?

Q. Or within some near date?

A. I don't think that anybody could estimate that. [445]

Q. When was it that you noticed the cave-in on the 125-foot level?

A. The first time I tried to go into it.

Q. Was that ever opened up?

A. I opened up quite a bit of it; yes, most of it. [447]

(Testimony of Frank A. Garbutt.)

Q. Are you in a position to state what the cost of removing or avoidance of the cave-in on the 125-foot level was; I mean the cave-in that you say existed on and before September 2, 1938?

A. It would take a lot figuring to get the exact cost on that. [448]

Q. Who did it?

A. We contracted a little of it there, contracted the labor; and that labor contract cost—done by a man named Armstrong, he is a miner I happened to know—his labor contract on that, I think, was about three and a half dollars a foot for the labor; and they used a lot of timber. It was not less than that.

Q. By the Court: Was this ore that they caved in, that you could mill it?

A. No; most of it was muck that you would get nothing from the muck. The ore had been taken out when the drift was originally run, your Honor, and gone to the mill. In cleaning up you would sometimes get some ore.

Q. By Mr. Abel: Since you took over the operation of this property there has been a very serious cave-in, has there not? A. Yes.

Q. On what level?

A. On 125, on No. 2 and No. 3 and No. 4. [449]

Q. I want to call your attention to Plaintiffs' Exhibit 91 and the second letter. Is that a copy of a letter sent by you? A. Evidently.

(Testimony of Frank A. Garbutt.)

Q. To Mr. Grill? A. Evidently; yes.

Q. And that letter was the first time that you had up with Mr. Grill the bringing of the quiet title suit in the State of California?

A. I would think so. You see, you brought one quiet title suit up there and I thought if it was wise in you it would not be foolish in us, if we were going to spend some money to quiet title. [450]

Q. Why do you say you did not follow up your contract rights and ask for a lien for your——

A. I didn't say it.

Q. ——for your expenditures?

A. I didn't say it.

Q. What was the reason that you did not take notes and did not assert a lien?

A. I didn't think it was material in any way and I have no idea of ever trying to enforce it. I didn't care if I had it or not. Those were proposed and arranged so as to protect the company against Mr. Vance and against you. I had no idea that I would ever enforce them. [454]

Q. You did, then, operate the mill personally in 1938, did you not?

A. I never did any personal work on it more than helping them clean up sometimes; but it was under my charge; [455] yes, sir.

Q. But wasn't it more than that after the December 17th contract went into force? And what day did that go into force?

(Testimony of Frank A. Garbutt.)

A. My recollection is and my understanding is December 17th. We commenced operating under that as of that date.

Q. And when did you commence actual operation under that contract, you, personally, as one of the parties to the contract, not Log Cabin Mines?

A. Well, I don't think I ever operated personally under that contract. I thought that operation was under the Log Cabin Mines.

Q. Even before it had any capital stock?

A. Well, it was effective as of that date.

Q. As of what date? A. December 17th.

Q. The subscription to the capital stock of Log Cabin Mines by Mutual was on what date?

A. I don't know.

Q. Was the mill and mine in operation before that date? A. Very probably.

Q. Well, it was in fact, was it not?

A. I imagine so.

Q. What time in January—can you tell from your records there what time in January the mill was put in [456] operation?

A. I can tell what time it was operating from these records; yes.

Q. Well, tell us.

A. Do you want to know what time in January it operated?

Q. Yes. A. What year?

Q. 1938.

(Testimony of Frank A. Garbutt.)

The Court: 1939.

Mr. Abel: '39.

A. Whichever year you want. You see, it made no difference who it was operated by.

Q. Never mind.

A. You want January, 1939?

Q. No. I want the date that the mill started to operate after the contract of September 17, 1938.

A. Then I have got to go back prior to that time and tell you when it was operating. Do you want 1938?

Q. I want the time that the mill started after December 17, 1938.

Q. By the Court: When did it first start operating after December 17, 1938?

A. All right. The first operation—I am confused in that question again. Will you give me that date again?

The Court: He asked you the question: When did you [457] first operate the mine after December 17th, 1938.

A. I have got to find December, 1938, and go on from there.

Mr. Abel: May we have the pay roll for January, '39?

Mr. Hinckle: We haven't it here.

A. We were not operating in December, '38.

Q. By the Court: When did you operate in January, then?

(Testimony of Frank A. Garbutt.)

A. The first operations under my charge was on January, 1939.

Q. What day?

A. They commenced on January 2nd.

Q. By Mr. Abel: And did you continuously operate from that day on?

A. As much as we could, as well as we could; yes.

Q. What interruptions were there?

A. Oh, just breakdowns of the old mill, sometimes a little lack of ore.

Q. The mine was in operation, was it not?

A. Not when the mill was not.

Q. You did not accumulate ore?

A. You couldn't. You had no place to put it. Fill the bins and you were done, a couple of days' run or a day's run. [458]

Q. Outside of the mint returns is there anything available in the way of data from which that has been prepared?

A. Well, you haven't the daily records here, the daily reports, rather, of the amount of ore milled; but the dates of that stuff you get off the mint returns.

Q. That would depend upon when you send the——

A. The bulk of this, of course, is my own computations to get these various results. The mill was run as continuously as it could be run from January

(Testimony of Frank A. Garbutt.)

2nd, when it started up, to the date it was shut down, to about five or six days prior to the starting up of the new mill. No distinction made in these records of the mine as to whether I was operating it, the Mutual, or the Log Cabin or who, the trustee or otherwise. It was operated. I think, in four different ways during that period. [459]

Q. Have you your income tax return for the period while you were operating it in the fourth way, as trustee?

A. I think the income tax records probably all went in together. I don't know. I didn't make them. I didn't see them. But it was operated on the start by me, and then it was operated for a short period of time as trustee for the Mutual while they were deciding what they wanted to do; then it was operated by the Log Cabin. In other words, as trustee, I was operating really under the name of Mutual, not as trustee by me and not as trustee.

Q. The four capacities, then, were you personally, you as trustee, Mutual Gold, and Log Cabin?

A. Well, I imagine that there was no operations carried on by me as trustee. I held the property in my name as trustee, but I think I operated it for the Mutual Gold. I don't think it was operated by me as trustee.

Q. Well, what, then, did you refer to as the four capacities in which you ran the property?

A. Well, that was just a mistake of mine. I just didn't take time to recollect what was done.

(Testimony of Frank A. Garbutt.)

Q. Have you a segregation of your operating costs in whichever capacity you operated?

A. No. They run along from day to day just the same.

Q. Run along together? A. Yes.

Q. And you spent money as you pleased, did you not? [460] A. Not as I pleased; no.

Q. As you decided?

A. I spent it according to my best judgment, after deciding with the Mutual and with ourselves, each, what we should do, what our operations should be.

Q. Well, when did you meet with Mutual on that subject?

A. Our business was mostly transacted by correspondence. I would write them in regard to my general plans or we would discuss it when we did meet, and then operate according to that program.

Q. The income tax returns, the federal income tax returns were all lumped together in whichever capacity?

A. I don't know. Mr. Carter made those. He knew the operations.

Q. Well, you swore to them, did you not?

A. Sir?

Q. You swore to them, did you not?

A. Well, whatever I swore to there I examined at the time and became familiar with it at the time.

Q. Just examine these two returns which have been produced by Mr. Carter or by your attorney.

(Testimony of Frank A. Garbutt.)

A. What will I see about them?

Q. I want to know whether all the operations, whether loss or profit, is expressed in those two returns for the period of 1939 and 1940.

A. I imagine so. It was all a part of one operation. [461]

Mr. Abel: We offer each of these copies in evidence.

Mr. Hinckle: No objection.

The Court: Give them separate numbers.

Mr. Abel: The 1939 we offer as——

The Clerk: Exhibit 92.

Mr. Abel: ——Exhibit 92; and for the year 1940 as Exhibit 93.

A. I would say this, though, Mr. Abel, that those income tax reports would not give a correct picture of a profit or loss, for this reason: That under the government regulations you have to charge a great many things to capital accounts that have no value as a capital account, therefore, it shows you a fictitiously large profit.

Q. Did you send Mr. Keily to Seattle about the 15th or 16th of August, 1938?

A. No; I don't think so. He went there about that time.

Q. He had been an intimate associate and employee of yours for many years prior to that time?

A. I think about 17 years, about 5 or 6 years previous to that time. I knew him well. When he died a short time ago he made me his heir in fact.

(Testimony of Frank A. Garbutt.)

Q. And you furnished him the money for him to make that trip?

A. I don't think so. He got a wire from up there to come up. I think it was on a Sunday, and he didn't know [462] if he could go or not. He finally decided he would. He had a short time to make the train and I drove downtown and bought a ticket for him which I gave him. I think he paid me for the ticket.

Q. And that was entered up and mentioned in your deposition, was it not?

A. I don't recall.

Q. Some $68? A. I don't recall.

Q. He went up as whose representative?

A. I don't know. He didn't go up as mine. He went up at the request of somebody that wired for him up there. I don't know. I imagine Log Cabin that he worked for—I mean Mutual.

Q. On his return he reported to you, did he not?

A. He didn't make any report to me; no. I talked to him.

Q. About the purposes of his trip?

A. Oh, I imagine he told me what happened. I was not especially interested in his purposes.

Q. Were you contemplating issuing the notice of rescission which was issued on August 25th at that time?

A. It had nothing to do with it, as I explained to you in much detail.

(Testimony of Frank A. Garbutt.)

Q. Were you contemplating the issuing of a notice of rescission at that time? [463]

A. I don't know. I have no independent recollection on it. I issued that when I found out——

Q. You furnished the ticket, then, to Keily?

A. I bought it for him.

Q. You saw him to the train?

A. What is it?

Q. You saw him to the train, you say?

A. No; I did not.

Q. But he came back and talked to you about his trip?

A. When he came back he probably talked to me, but I have no independent recollection about it.

Q. And did you know that he had talked with two of the directors of Mutual Gold on that occasion? A. On what occasion?

Q. On the occasion of his trip?

A. You mean up there or down here?

Q. Up there?

A. I don't know who he talked to up there.

Q. You knew that there had been a meeting on August 13th at which the De Mille proposal was put in?

A. I probably knew all about it at the time.

Q. You drafted the De Mille proposal?

A. What is it?

Q. You drafted the De Mille proposal?

A. Yes. I probably had some assistance in it, but I think I drafted it. [464]

(Testimony of Frank A. Garbutt.)

The Court: Any further questions? I would like to ask the witness a question.

Q. What experience in mining did you have prior to this experience, Mr. Garbutt?

A. Well, my first experience in mining occurred at Solano, California. Above Boulder, at the tender age of 7 years. I lost $20,000 at that time that I didn't know anything about. My father was a mining engineer and came here from Canada when 16 years of age with $4 and went through Harvard College. He taught me what I know about mining. He was a mining engineer. I had various experiences then, commencing in Leadville, Colorado, in 1879 and '80 prior to the railroad there. I worked at a mine shortly thereafter at Redcliff. My father built a smelter both at Redcliff and at Leadville.

Then my next experience in mining—well, I had a little experience around Blackhawk. That is near the Golden School of Mines, the Colorado State School of Mines now in Colorado.

I came here in 1882 and worked in San Bernardina County at one or two properties there.

Q. What properties?

A. I don't remember one of them. The Sidewinder was one that belonged to my father and Charley Canfield.

Q. In Victorville? [465]

A. It was in Victor. It was not Victorville. At the Oro Grande I did a little work, not much, At a mine called the Alturas Mine—that is above San

(Testimony of Frank A. Garbutt.)

Bernardino—I made some examinations there for Judge Otis of San Bernardino, but not directly for him. Mr. Ryan, who owned an interest in the mine, through a friend of mine got me to go up there and test a mill they had and make them a report on the property. I worked in San Diego County at the mines in an early day. I beat a drill underground. The last time I did underground work was beating a drill in the Mentone water tunnels above Mentone there, above Redlands there. That is the last mining that I did underground. I went from there to Canada, took charge of a gold mill. I had worked in a couple of gold mills in the meantime, and ran that gold mill there as superintendent until I milled up their ore; and then when I came back to California I engaged in general mining. Let's see—no. I went from there to New Mexico. I was mechanic in charge of the erection of the Bucyrus Steam Shovel & Dredge Company plant on the Chama River; and then I had a general mining experience a little in Lower California, some in San Diego County, some in Riverside County. I had some mining experience in Utah and in Arizona.

I then dealt in mines, that is, I bought them and spoiled them and gave them away, and worked for others when I had commissions to work, examinations and things of that kind, and engaged in min-

[466]

ing until about 9 or 10 years ago, when I retired from mining until I got towed into this by my sym-

(Testimony of Frank A. Garbutt.)

pathies for Mr. Collins and his stockholders.

I have had a general experience in mining in building and operating plants and in engineering work and in metallurgical work. And I was educated as a geologist. For a number of years I had charge of the Union Oil Company's field and land development work. I have some mines out in Utah now. They are, however, not gold. Most of my mining was gold mining. I had a little experience in silver and lead, and a little in iron properties, but not much. The last two or three years I have owned and operated, or helped to operate some vanadium properties, and have made a good many metallurgical tests on those.

I was assistant assayer in the old Elgin smelter in Leadville, built by my father, and I have done assaying in mines, and that is about the extent of my experience. The last mine I owned out in Arizona I sold about, I think about 12 years ago. I had gold mines out there. While they did not amount to very much, one of them was the old Schuylkill-Tennessee. I got into that by having a mortgage on it and I sold out about 12 or 14 years ago. And I sold the old Signal Mine. That is the mine that Dick Gird won from—not Dick Gird, but Ed Scheffelin, who discovered Tombstone—and Dick Gird, his partner, the Chino Ranch was named after, was a friend of the family, and I had some [467] mining relations and actual mining in that way.

(Testimony of Frank A. Garbutt.)

Q. In other words, you have spent your whole lifetime virtually in the mining game?

A. I have been in so many different ones at the same time that you couldn't say my whole lifetime; but I have spent my whole lifetime at mining or interested in mining. I have mined in Northern California, up above Grass Valley there, when I first studied mining engineering. The North Star and the Empire mines in Grass Valley were the deepest mines in the world, 750 feet deep about 50 years ago. I went underground in them about 7,000 feet with the general manager, Mr. Star. I went back there a few years ago when I went into this thing to brush up and met a Mr. Nob, who was assistant superintendent when I was there before, and he remembered me and showed me every courtesy, took me through his mill; and since I have entered into this enterprise I have rubbed up on the old books and on the modern books on mining and metallurgy. I have visited a number of mills to see what was being done and I am acquainted and familiar with the leading people in mining, such as the Dorr people and the American-Cyanamid people, who made tests for us at this mine. So I have made very thorough tests on this, and I have had my head chemist work on this property here six or eight months, making amalgamation tests and cyanide tests in connection with Mr. Kivari who is the coast representative of the Dorr Company [468] here. I

(Testimony of Frank A. Garbutt.)

have read all the modern works since that time and reviewed my geology, for whatever it may be worth, since that time. I have put in a lot of work in order to qualify me to know what was being done and what was the modern practice here, both in the United States, Canada and South Africa. Mr. Charles Butters, who went to South Africa with John Hays Hammond and came back here with, I think, $15,000,000, formerly worked for my father as assayer—I knew him at the time—for $75 a month. My father said, "He will go a long ways; he is a plugger and he is honest." I think my father——

The Court: I think that covers the point.

A. I have worked underground. There isn't anything about this mine that I can't do as well, except for my age. And stamp mills, I know stamp mills by heart. I can play a tune on that thing. I can cock one eye on the ore bin and tell you whether the ore will run until morning.

Redirect Examination [469]

Q. ——December the 10th, 1938, signed "Mutual Gold Corporation," and ask you if you received that through the mail also?

A. I would like to look at that other one a second time. Yes; this is one that I received in due course. I would like to explain, if I may. This is outside. I guess it is nothing. The reason of our

(Testimony of Frank A. Garbutt.)

haste for building that highline, that power line, if they didn't get started that year they were done. And a few days, which I think was probably a couple of weeks, and Mr. Grill—this was a day or two before I went to the company, to the power company to survey for that line. It was a close question of whether we could get in or not with that line, and if they didn't we were sunk. [470]

DEFENDANTS' EXHIBIT Q

December 10, 1938

Frank A. Garbutt,
Los Angeles, Cal.

Dear Sir:

We hereby request that you expend for us and on our account under our contract with you of November 1st, 1938, such monies as may be necessary to complete the pipe line from our drain tunnel to the tailings pond at the end of our present flume, to put our mill in condition to run, to complete the installation of the hoist, cage, compressor, etc., to pay our taxes, such insurance as is needed, such minor outlays as seem necessary to you for the protection of our property, to provide a way of disposing of our tailings from the mill when it starts up and for any similar expenses or equipment neces-

(Testimony of Frank A. Garbutt.)

sary in your opinion to the starting up and operation of the mine and mill and the protection of the property, including repairs to the road.

We understand that it is not obligatory for you to furnish any money for these purposes and that it is optional with you, but for any such monies as you may elect to advance, we will give you our notes as provided in said contract with you dated November 1st, 1938.

[Seal] MUTUAL GOLD CORPORATION

By J. E. STIEGLER

President

And E. FUSON

Secretary.

DEFENDANTS' EXHIBIT R

April 12, 1939.

Mr. Frank A. Garbutt,
Suite 712, 411 W. 7th. St.,
Los Angeles, California.

Dear Mr. Garbutt:

Being without funds for that purpose, we hereby request and authorize you to make payment to the Log Cabin Mines Company, or into its treasury, of the $10,000 which the Mutual Gold Corporation is obligated to make to it for the purchase of 10,000

(Testimony of Frank A. Garbutt.)

shares of its capital stock, as provided in the contract of December 17, 1938 between us, yourself and the Log Cabin Mines Company, and we hereby acknowledge that this $10,000, together with the other monies advanced for our account or for us in the past, is the obligation of the Mutual Gold Corporation, which obligation is to remain in force until our contract of December 17, 1938 between the Mutual Gold Corporation, yourself and the Log Cabin Mines Company has been completed by the carrying out of said contract.

[Seal] MUTUAL GOLD CORPORATION

By J. E. STIEGLER

C. T. ORR,

Sec.

(Testimony of Frank A. Garbutt.)

DEFENDANTS' EXHIBIT S

In the Superior Court of the State of California
in and for the County of Los Angeles

No. 440-367

LOG CABIN MINES COMPANY, a corporation
Plaintiff,

vs.

MUTUAL GOLD CORPORATION, a corporation, et al,
Defendant.

JUDGMENT QUIETING TITLE
AFTER DEFAULT

In this action, it appearing to the satisfaction of this Court, sitting in Department X 34 thereof, that

(a) The defendant Mutual Gold Corporation, a corporation, was duly and personally served with the Summons and Complaint herein, and

It further appearing that no appearance has been made and no answer filed by the said defendant; and a default of said defendant having been duly entered; and evidence having been introduced and heard in open court, and the court being satisfied that the allegations of the complaint are true, and that the relief asked for should be granted.

Now, upon motion of David E. Hinckle, Attorney for the plaintiff Log Cabin Mines Company,

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

It is hereby Ordered, Adjudged and Decreed:

I. That at the time of the commencement of this action there was vested in the plaintiff, as the owner absolute, title to that certain contract dated July 13, 1932 for the sale of certain mining claims in Mono County, California, executed by M. N. Clark, Alice Clark Ryan, and the Chandis Securities Company as ventors, and by Russell F. Collins and Ben L. Collins as vendees, as said contract was supplemented by written instrument dated April 28, 1934 and was modified and amended by written instrument executed on or about October 9, 1936, a copy of said contract being attached, as "Exhibit A", to the complaint filed herein, and a copy of said instrument supplementing said contract being attached, as "Exhibit B", to said complaint, and a copy of said instrument modifying and amending said contract being attached, as "Exhibit C", to said complaint.

Said mining claims agreed by said contract to be conveyed are: Log Cabin, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Mill Site, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro, and Burke Fraction.

II. Plaintiff's title to the above described personal property is hereby forever quieted against any and all claims, demands and/or pretensions of said de-

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

fendant to any right, title, possession, lien, interest and/or equity in the above described personal property, and it is hereby perpetually enjoined and restrained from setting up or making any claim to or upon the personal property above described, or any part thereof.

Dated: June 13th, 1939.

WILSON

Judge of the Superior Court.

[Title of Superior Court and Cause.

REQUEST FOR ENTRY OF DEFAULT

To the Clerk of Said Court:

The defendant Mutual Gold Corporation having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, application is hereby made that you enter the default of said defendant, herein according to law.

DAVID E. HINCKLE

Attorney for Plaintiff.

Dated the 9th day of June, 1939.

(Testimony of Frank A. Garbutt.)
(Defendants' Exhibit S—continued)

[Title of Superior Court and Cause.]

DISMISSAL

To the Clerk of Said Court:

You will enter the dismissal of the above entitled action. John Doe No. 1 to No. 500 inclusive, Jane Doe No. 1 to No. 500 inclusive, and Corporation No. 1 to No. 100 inclusive.

Los Angeles, Cal., June 6, 1939.

DAVID E. HINCKLE
Attorney for Plaintiff.

[Title of Superior Court and Cause.]

SUMMONS

The People of the State of California Send Greetings to: Mutual Gold Corporation, a corporation, John Doe No. 1 to No. 500 inclusive, Jane Doe No. 1 to No. 500 inclusive, Corporation No. 1 to No. 100, inclusive, Defendants.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

and answer as above required, the plaintiff will take judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 5th day of May, 1939.

[Seal Superior Court Los Angeles County]

L. E. LAMPTON,

County Clerk, and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By M. LA VALLEY

Deputy.

[Title of Superior Court and Cause.]

COMPLAINT TO QUIET TITLE TO PERSONAL PROPERTY

The plaintiff complains and alleges:

I

That plaintiff is a corporation organized and existing under the laws of the State of California and having its principal place of business in the County of Los Angeles, California.

II

That defendant Mutual Gold Corporation is a corporation organized and existing under the laws

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

of the State of Washington, and duly authorized to do business in the State of California.

III

That Corporation No. 1 to No. 100 inclusive are corporations duly and lawfully organized and doing business under their respective names.

IV

That defendants John Doe No. 1 to No. 500 inclusive, Jane Doe No. 1 to No. 500 inclusive, and Corporation No. 1 to No. 100 inclusive are sued herein under fictitious names because their true names are unknown to plaintiff; and that plaintiff will, when it ascertains the true names of said defendants, ask leave of court to amend this complaint by substituting said true names for said fictitious names.

V

That on or about July 13, 1932 a contract for the sale of certain mines and mining claims in Mono County, California was executed by M. N. Clark, Alice Clark Ryan, and the Chandis Securities Company as vendors and by Russell F. Collins and Ben L. Collins as vendees, a copy of said contract being attached hereto as "Exhibit A" and made a part of this complaint; that said contract was on or about July 18, 1932 sold and assigned by said vendees to defendant Mutual Gold Corporation; that thereafter on or about April 28, 1934 said contract was

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

supplemented by written instrument, a copy of which is attached hereto as "Exhibit B" and made a part of this complaint; that thereafter on or about October 9, 1936, said contract as so supplemented was modified and amended by written instrument, a copy of which is attached hereto as "Exhibit C" and made a part of this complaint; and that on or about March 10, 1939, in the County of Los Angeles, State of California, said contract as so supplemented, modified, and amended, was sold and assigned and delivered to plaintiff by defendant Mutual Gold Corporation, and is now in plaintiff's possession.

VI

That plaintiff is now, and at all times since on or about March 10, 1939 has been, the owner of, and in possession of, said contract as so supplemented, modified, and amended.

VII

That defendants claim and assert an interest adverse to plaintiff in and to said contract as so supplemented, amended, and modified; that the claims of defendants are without any right; and that none of said defendants has any estate, right, title, or interest whatever in said contract or in the supplement thereto or in the modification and amendment thereof.

Wherefore, plaintiff prays that each defendant be required to set forth the nature of his or its said

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

claim, and that all adverse claims of said defendants be determined by a decree of this court; and plaintiff further prays that by said decree it be declared and adjudged that plaintiff is the owner of said contract as so supplemented, amended, and modified; that none of defendants has any estate or interest whatever therein or thereto; that defendants and each of them be forever debarred from asserting any claim whatever in or to said contract or supplement thereto or amendment or modification thereof adverse to the plaintiff; and that plaintiff have judgment for its costs herein and for such other relief as may be equitable.

.....

Attorney for plaintiff

EXHIBIT A

This Agreement of Sale made this 13th day of July, 1932, by and between the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, of Los Angeles, California, hereinafter designated as the Sellers, and Russell F. Collins, of Seattle, Washington, and Ben L. Collins, of Spokane, Washington, hereinafter designated as the Buyers, Witnesseth:

That For and in Consideration of the payments to be made by the Buyers to the Sellers at the times and in the manner herein specified, and in consideration of the promises and agreements to be well and truly performed by the said Buyers, the said

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

Sellers hereby agree to sell to the said Buyers the following described patented and unpatented lode mining claims situate in Mono County, California, and more particularly described as follows, to-wit: Log Ca*g*in, Log Cabin No. 1, Log Cabin No. 2, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5, Log Cabin No. 6, Log Cabin No. 7, Log Cabin No. 8, Mill Site, New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Log Cabin Annex, Tamarack, Oro, and Burke Fraction.

All of the above described claims having been recorded at one time or another at Bridgeport, Mono County, California, in what has been known at various times as the Mono Lake Mining District, the Bridgeport Mining District and the Homer Mining District.

And also such water rights as the said Sellers may own in connection therewith.

The condition of the titles to said property is as follows:

Log Cabin claims, Log Cabin No. 2, Log Cabin No. 6 and Log Cabin No. 7 are patented.

Log Cabin Annex is a mining location filed recently at Bridgeport by H. R. Bradley and deeded by H. R. Bradley and wife to the Sellers herein.

Claims Log Cabin, Log Cabin No. 1, Log Cabin No. 3, Log Cabin No. 4, Log Cabin No. 5 and Log Cabin No. 8 are mining locations and in the opinion of the Sellers can be patented at any time.

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

It is stated by James Simpson that claims New Year No. 2, Federal No. 1, Federal No. 2, Federal No. 3, Tamarack, Oro and Burke Fraction have all had the assessment work done on them and title to them is in good condition.

The Sellers or their immediate predecessors in interest have located those claims and have held title thereto for approximately twenty (20) years and believe their titles to be good and they hereby represent that there are no mortgages, indebtedness or other encumbrance against said claims of which they have any knowledge, but they expressly disclaim any liability for these titles, and the Buyers having been afforded an ample opportunity to examine same, hereby accept said titles, it being distinctly understood that the only estate to be conveyed hereunder is all of the right, title and interest which the said Sellers may have or may hereafter acquire thereto.

This agreement of sale is to extend for a period of five (5) years from the date hereof unless sooner forfeited or terminated as hereinafter provided. Under this agreement the said Buyers shall have the right of possession with the right to mine and develop said properties or any of them, including the right to follow and explore by proper working any vein or veins within said group of claims to the limit or exterior boundary lines thereof, to the same extent and no other as the Sellers, by virtue of their

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

title and interest in said group of claims, have or may hereafter acquire, and to follow any ore shoot or ore body found within the limits of said property in any direction to the same extent as said Sellers might lawfully do, and to break down and remove and mill or sell all commercial ores found therein except as hereinafter expressly provided, to-wit:

It is understood and agreed that until said Sellers have been paid in full for said mining claims, in accordance with the terms hereof, that the ore already exposed above the present drifts on the vein at a depth of approximately 125 feet below the collar of the shaft and within the present extreme north and south faces, shall remain intact and unless expressly permitted by permission in writing from said Sellers none of this ore shall be mined or removed from the mine and neither shall any ore at present on the dump be removed or milled by said Buyers.

In consideration of the agreements herein contained the said buyers covenant and agree with said Sellers as follows:

1. To enter upon said mining claims immediately after the execution and delivery of this agreement and after the posting of the notices hereinafter provided to be posted, and agree to work the same continuously and in good workmanlike and minerlike fashion so as to develop said property with due regard for the continuance and preservation of the

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

same as a workable mine in accordance with the covenants herein set forth.

2. The Buyers agree to work at least sixty (60) shifts of one man each of eight (8) hours' duration per month until August 10, 1932, after which date said Buyers agree to work not less than one hundred fifty (150) similar shifts per month of eight (8) hours each during the life of this agreement, it being understood that each shitf is to consist of the day's work of one competent miner or its equivalent in value. It is agreed that the excess of 150 shifts per month for any given month is to be credited on work to be performed during the succeeding month or months during each year but that work during one year is not to be credited to the work to be done in any succeeding year, and that the said Buyers agree that there at all times shall be enough work performed by them to fulfill any work necessary to be performed for assessment purposes.

4. The Buyers agree to install a compressor, pump, machine drills and other necessary equipment to sink the present shaft that is now down one hundred twenty-five (125) feet from the surface to a total depth of two hundred fifty (250) feet or to the point of its intersection with the vein and to drift upon the vein from the point of intersection for a distance of not less than two hundred (200) feet, and to do any other development work that

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

said Buyers may deem advisable for the development of additional ore.

5. The said Buyers agree to well and sufficiently timber the tunnels, shafts and drifts used, opened or extended by them when necessary in said mine at all points and in accordance with good mining methods and to repair all old timbering in such workings and in all existing openings which are now open and which show any mill ore. This work of timbering and retimbering is to be done whenever and wherever it may become necessary for the safety of workmen and ore and for the preservation of said mine as a working mine, and said Buyers agree to fill all stopes with waste after the ores therefrom are removed so as to keep and leave said mine in a safe and proper condition for further development and exploration and in accordance with the usual custom of good miners.

6. The said Buyers agree that the said Sellers may at all times enter, in person or by their duly authorized agents in writing, to inspect said property and any and all parts thereof, and the said Sellers shall have the right to keep one or more representatives at all times upon said property to represent them and to inspect same but always at their own sole cost and expense except that the said Sellers may furnish one representative who shall be a practical miner or a practical mining man, able and willing to work for the said buyers,

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

performing such work as may properly be allotted to him, and this representative the said Buyers agree to pay the same wages as they pay to other employees in a similar capacity, it being understood that should the representative so nominated by said Sellers not perform as much useful work as their other similar employees that the said Sellers will either accept reduced pay for him or furnish another representative to take his place.

7. The said Buyers agree to pay for all labor, material and supplies employed or used by them in the development and operation of said mining claims under this agreement, including the payment of all taxes and assessments from and after the date of July 13, 1932, during the term of this agreement, and said Buyers agree not to permit any lienable claims, including such labor, material or supplies, to be filed against said mining property, and agree to save said Sellers harmless therefrom.

8. The said Buyers agree that before they allow any material, machinery or supplies to be brought upon said property that they will obtain and furnish to the said Sellers a release or waiver from the vendors thereof releasing and waiving any right or rights which said vendors may have to file a lien or liens against the property of the Sellers, and in like manner, before employing any labor thereon, will obtain from the employees who are to perform this labor a like release to the end that all laborers, material men or contractors will look solely to the

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

Buyers and their interest in the property for payment and will waive any right or claim that they may have against said Sellers or the property herein described owned by them.

9. The said Sellers agree that they will forthwith, upon the signing of this agreement, post or cause to be posted proper notices in conspicuous places upon said property notifying all persons employed thereon or who furnish material and supplies to the said Buyers therefor that neither said property nor said Sellers will be liable for same or will said property be liable for lien therefor.

10. The said Buyers agree that they will not commence any work upon said property nor order any material therefor until said notices have been posted and that thereafter they will maintain said notices or cause same to be maintained at all times that they are in possession of or are operating said property, and should the said Buyers commence work before said notices are posted or perform any work upon said property while said notices are not maintained thereupon, this agreement shall immediately terminate and cease at the option of the said Sellers.

11. The said Buyers agree to comply strictly with the Workmen's Compensation or Industrial Insurance Act of the State of California providing casualty insurance for all workmen injured while employed by them in the exploration and develop-

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

ment of said mining claims or for any other work performed by the said Buyers or at their instance during the term of this agreement.

12. After said shaft has been sunk to the intersection of the vein and drifted on for a distance of not less than two hundred (200) feet, if by that time sufficient tonnage of commercial ore is in sight to justify a mill, and, if not, as soon as sufficient tonnage of commercial ore is in sight, the said Buyers agree to build a suitable mill and mill buildings and to install proper milling machinery for the economical and proper milling of said ore and to proceed without delay in a minerlike fashion to mine, mill, and market said ores which have been developed on said property by the operation of said Buyers but especially excepting therefrom all ores hereinbefore referred to in the mine and on the dump as hereinbefore described.

13. The said Buyers expressly agree to impound all mill tailings which assay over One ($1.00) Dollar per ton to the end that they will be preserved for future treatment.

14. It is understood and agreed by the parties hereto that after the said sinking, drifting and building of a suitable mill are completed and the mine is put on production that Five ($5.00) Dollars per ton is to be allowed to the said Buyers to *cofer* the cost of all mining, milling and marketing and that the Sellers shall receive the balance over Five

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

($5.00) Dollars per ton, which amount shall be applied as received upon the purchase price of said property until it is paid for in full.

Should the Buyers mine and mill any ore which returns less than Five ($5.00) Dollars per ton net, they shall pay all of the costs thereof over and above the net returns received and this shall not be a charge against the said Sellers or against any future returns which they are entitled to receive.

In consideration of the foregoing conditions and the expenditures to be made and the work to be done hereunder by the said Buyers, and in consideration of the faithfully keeping of all of the covenants herein contained, the said Sellers hereby give to the said Buyers the right to purchase all of the above described property for the sum of One Hundred Fifty Thousand ($150,000.00) Dollars, payable as follows: One Thousand ($1,000.00) Dollars on or before August 1, 1932, One Thousand ($1,000.00) Dollars on or before November 1, 1932, One Thousand ($1,000.00) Dollars on or before January 1, 1933: One Thousand ($1,000.00) Dollars on or before March 1, 1933, One Thousand ($1,000.00) Dollars on or before May 1, 1933, One Thousand ($1,000.00) Dollars on or before July 1, 1933, One Thousand ($1,000.00) Dollars on or before September 1, 1933, One Thousand ($1,000.00) Dollars on or before November 1, 1933, One Thousand $1,000.00) Dollars on or before January 1, 1934, (One Thou-

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

sand ($1,000.00) Dollars on or before March 1, 1934 and One Hundred Forty Thousand ($140,000.00) Dollars on or before five (5) years from date hereof, it being understood and agreed that all amounts paid by the said Buyers under the terms of this agreement shall be applied to and credited upon the several installments of the purchase price as they mature and as hereinbefore provided, and that in case said sums shall amount to the full purchase price of said claims to be paid, as herein provided prior to the expiration of the term of this agreement, or upon full payment of said installments to the said Sellers, according to the terms of this agreement, then the said Sellers shall execute a good and sufficient deed conveying to the said Buyers all their right, title and interest in and to the lode mining claims, to the water and right of way for flume hereinabove particularly referred to, clear of all encumbrances suffered or permitted by them.

The Buyers may proceed at their own expense to patent at any time they deem advisable any of the unpatented claims of said group in the name of the Sellers. The Sellers agree to cooperate and assist in obtaining such patents.

Time is of the essence of this agreement, and it is expressly agreed that in case of any violation by the Buyers of any covenant herein contained, or upon their failure or refusal to carry out or comply with all of the terms and conditions of this agreement, (labor, strikes, injunction proceedings,

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

or other outside interference except weather, over which said Buyers have no control excepted), the Sellers, at their election, may terminate this agreement.

In the event of a default by the said Buyers in performing any of the conditions or covenants herein set forth or should said buyers default in making any of the payments herein provided for at the time and in the manner specified, the Sellers may, at their option, give notice to said Buyers of the termination of this agreement by depositing such notice in the United States mail, registered and postage prepaid, addressed to the said Buyers at the mine and at the last known post office address given to said Sellers by said Buyers, and the depositing of said notices and the affidavit by the Sellers or any of them that same have been deposited shall be conclusive proof that the notices were given, and this agreement shall be terminated thereby at the option of the said Sellers.

In the event of a default by the Buyers in the performance of some covenant or condition in itself immaterial and of which default they may be unaware, the Sellers, before giving the notice as set forth, will notify the said Buyers of the default complained of and shall allow them thirty (30) days from the date of giving said notice in which to cure same and remedy said default or defaults so complained of.

In the event of the termination of this agreement

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

by default the said Buyers shall have no claim against the Sellers of any kind or nature or compensation for any labor performed, expenses incurred or services rendered in connection herewith or hereunder, and all machinery, tools, and appliances, fast or loose, placed upon said property by them or under this agreement shall remain upon said property as a part thereof and become the property of the said Sellers.

It is understood and agreed that the said Buyers shall have the use of all buildings, machinery and equipment now on said premises but in the event of the termination of this agreement same are to be left in as good repair as they now are, necessary and usual wear and tear excepted.

It is agreed that the said Buyers will not record this agreement until they have paid at least Ten Thousand ($10,000.00) Dollars thereon, and should said agreement be recorded by them or by any one for or under them prior to the completion of the payments to the amount of Ten Thousand ($10,000.00) Dollars, such recordation shall, at the option of the said Sellers, immediately terminate this agreement and this option shall be evidenced by the recordation of the declaration of such intention or desire by the said Sellers.

All payments to be made to the said Sellers by the said Buyers hereunder shall be made to their order at the Citizens National Trust and Savings Bank of Los Angeles.

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

This instrument shall be binding upon the heirs, assigns, and successors of the respective parties hereto but before the said Buyers shall assign same they will notify the said Sellers of such intention and at the time of such assignment will obtain for the Sellers in form satisfactory to them a written agreement in which their assignees accept the same responsibility as the Buyers have hereunder, and said Buyers shall not be relieved from their liability hereunder even in event of an assignment unless specific consent thereto is given in writing by the said Sellers.

In event of the insolvency of the Buyers or of their successors and assigns, or in event that proceedings in involuntary bankruptcy are brought against them, said Sellers may, at their option, terminte this lease.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and date first above written.

CHANDIS SECURITIES COMPANY

By HARRY CHANDLER,
President.

M. N. CLARK,

ALICE CLARK RYAN,
Sellers.

RUSSELL F. COLLINS,

BEN L. COLLINS,
Buyers.

(Testimony of Frank A. Garbutt.)
(Defendants' Exhibit S—continued)

State of California
County of Los Angeles—ss.

On this 13 day of July, 1932, before me, Rose B. Coidarrens, a notary public, in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared Harry Chandler, known to me to be the President of the Chandis Securities Company, the corporation described in and which executed the above instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

ROSE E. COIDARRENS,
Notary Public.

Commission expires February 8, 1935.

State of California
County of Los Angeles—ss.

On this 13 day of July, A. D. 1932, before me, Rose B. Coidarrens, a notary public, in and for the said county and state, residing therein, duly commissioned and sworn, personally appeared M. N. Clark, Alice Clark Ryan, Russell F. Collins and Ben L. Collins, known to me to be the persons whose

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

names are subscribed to the above instrument, and acknowledged that they executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

ROSE B. COIDARRENS,
Notary Public.

Commission expires February 8, 1935.

EXHIBIT B

SUPPLEMENTAL AGREEMENT

Referring to that certain agreement of sale made July 13, 1932 by and between the Chandis Securities Company, M. N. Clark, and Alice Clark Ryan, of Los Angeles, California, therein described as the Sellers, and Russell F. Collins, of Seattle, Washington, and Ben L. Collins, of Spokane, Washington, hereinafter designated as the Buyers, in which the Sellers agree to sell to the Buyers that certain mining property located on Mono County, known as the Log Cabin property, more particularly described in said agreement which is hereby made a part hereof, said parties agree to and with each other to modify same as follows:

Whereas on page 4, paragraph 4 of said agreement, the Buyers agreed, amongst other things, to sink the existent vertical shaft from a depth of 125 feet to a total depth of 250 feet or to the point of its intersection with the vein, and

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

Whereas in the sinking of said shaft the Buyers encountered sufficient water to make the pumping thereof very expensive, and

Whereas they are desirous of substituting other work therefor, and propose, in lieu of the sinking of said shaft to the said depth, that they run an adit level, which they believe will be not less than 1200 feet in length, from the surface to said vein at or near the point where it would be intersected by said shaft and at a depth to where it will strike the ledge not less than said 250 feet in depth from the surface, and

Whereas the said Sellers are agreeable to this substitution,

Now Therefore, in consideration of the agreement of said Buyers, and their successors in interest, the Mutual Gold Corporation, that they will run said adit level in accordance with all of the general terms as set forth in said original contract, the Sellers hereby consent that said original contract shall be amended so as to permit the running of said level instead of the sinking of said shaft, and further agree that the Buyers may sink what is known as the North winze on the vein as far as they desire to sink same.

The work upon said adit level shall be carried on upon the same terms and conditions as to the amount of work to be performed as applied to the sinking of said shaft.

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

The Sellers also agree that in event the Buyers run the completed adit level as agreed to the point where it intersects said vein that they will extend the time of said contract of July 13, 1932 for an additional period of nine (9) months.

Whereas, further, the Buyers have erected a mill upon said property in the anticipation of the completion of said shaft by or before this time, and

Whereas they are desirous of operating said mill for the purpose of testing same and for the purpose of determining its adaptability to same the values contained in the ore from said property, and

Whereas, under the existing contract of July 13, 1932 they do not have the privilege of milling ore except as therein provided,

Now Therefore, in consideration of the premises and of the covenants and agreements in this modification contained, the said Sellers agree that when desired by the Buyers and on reasonable notice from them in order to enable the Sellers to send a representative to supervise this work, that the Sellers will allow the Buyers to mill enough ore from said property to test said mill but not to exceed an amount, however, necessary to produce gold to the value of approximately $1000.00 and the Buyers will pay the cost of such representative, which cost shall be his actual expenses and not to exceed $10.00 per day for such time as he puts in on the property.

In consideration of the above, the Sellers agree to the substitution of the work of running the

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

adit level to the intersection of the vein in lieu of the sinking of said shaft and the Buyers agree to perform said work in accordance with all of the terms of said contract, which it is agreed between the parties hereto is modified only to the extent of this Supplemental Agreement and otherwise shall remain in full force and effect.

In Witness Whereof the parties hereto have hereunto set their hands and seals the 28 day of April, 1934.

CHANDIS SECURITIES COMPANY
By HARRY CHANDLER
President

M. N. CLARK
ALICE CLARK RYAN
Sellers

RUSSELL F. COLLINS
BEN L. COLLINS
Buyers

MUTUAL GOLD CORPORATION
By RUSSELL F. COLLINS,
Pres.
Successors in interest to the Buyers

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

EXHIBIT C

Referring to that certain agreement made the 13th day of July, 1922, by and between the Chandis Securities Company, M. N. Clark and Alice Clark Ryan, therein designated as the Sellers, in which agreement said Sellers agree to sell to Russell F. Collins and Ben L. Collins, designated therein as the Buyers, that certain property known as the Log Cabin Mines situated in Mono County, California, and more particularly described in said agreement, which said agreement for the purposes herein is hereby made a part hereof, and which said agreement was, with the consent of the Sellers, assigned to and assumed by Mutual Gold Corporation; and

Referring to that certain Supplemental Agreement made April 28, 1934, by and between the same parties,

The same are hereby modified and amended as follows this 9th day of October, 1936.

For and in Consideration of the undertaking and agreement by the Mutual Gold Corporation, the assignee of said Buyers to spend upon said property the additional sum of Thirty Thousand ($30,000.00) Dollars under the direction of said Mutual Gold Corporation, as hereinafter set forth, the Chandis Securities Company and Alice Clark Ryan, for herself and as assignee of M. N. Clark, hereby agree to and with the Mutual Gold Corporation to modify said agreement as follows:

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

The Sellers will allow to the Corporation the sum of Eight ($8.00) Dollars per ton to pay the expenses of mining and milling all ore taken out in development work below the ore reserved in the contract of July 13, 1932, down to the drifts existing on that date, approximately one hundred twenty-five (125) feet below the collar of the present main working shaft and within the extremen North and South faces as they existed on the 13th day of July, 1932, provided that this work consists of raises and levels and that the raises are not closer to each other than two hundred (200) feet and the levels are not closer than one hundred (100) feet to each other, and

Provided further, that all receipts in excess of Eight ($8.00) Dollars per ton from mining and milling of said ores from this work shall be *apdi* to the Sellers to apply upon the purchase price hereunder, and under said original contract of July 13, 1932, and

Provided further, that the Corporation may, as provided in the original contract, mill any other ore outside of the herein described area, and should said Corporation mill or mine any such, the allowances for mining and milling thereof shall be the same as set forth in the original contract, to-wit, Five ($5.00) Dollars per ton and that all excess over and above these amounts shall be paid to the Sellers as provided in said contract, and

Provided further, that said Corporation shall not mill any of the ore prohibited in the original con-

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

tract without the additional written consent of the Sellers being first had and obtained, and

Provided further, that should the aggregate of these payments not amount to the sum of Ten Thousand ($10,000.00) Dollars on or before November 1, 1937, that the Corporation shall make up any such deficit, and

Provided further, that should said payments from the milling and marketing of ores as aforesaid not amount to Ten Thousand ($10,000.00) Dollars for the years ending November 1, 1938, November 1, 1939, and November 1, 1940, that the Corporation will in like manner make up such deficit on account of the purchase price so that the Sellers will receive the minimum sum of Ten Thousand ($10,000.00) Dollars during each of said years, and

Provided further, that the remainder of the purchase price shall be payable on or before November 1, 1941.

The Corporation warrants to the Sellers, as a partial consideration for this amendment, that it has on deposit Fifteen Thousand ($15,000.00) Dollars in the Old National Bank at Spokane, Washington, which money can be drawn only upon the order of J. A. Vance, its General Manager, and only for the purpose of carrying on the work aforesaid, and that it has Fifteen Thousand ($15,000.00) Dollars more subscribed for this purpose which will be available upon ten (10) days' call to be used for the same purposes and in the same manner, and

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

that the expenditures of said total of Thirty Thousand ($30,000.00) Dollars for the purposes as herein set forth, to-wit, mining, milling and developing said property by the Mutual Gold Corporation under the advice and supervision of capable management is guaranteed by said Corporation.

Should the Mutual Gold Corporation fail to keep any and all of the provisions of this modification agreement, the Corporation may, at its option, terminate same by giving notice to the Sellers of its desire to do so, in which event said original agreement shall stand in all respects as though this modification agreement had not been made.

CHANDIS SECURITIES COMPANY
By
and

.....

Sellers

Accepted this ..... day of October, 1936

MUTUAL GOLD CORPORATION,
by
and

State of California,
County of Los Angeles—ss.

S. C. Hall being first duly sworn, deposes and says: That he is president of the Log Cabin Mines Company, a corporation, plaintiff in the foregoing and above entitled action; that ..... has read the

(Testimony of Frank A. Garbutt.)

(Defendants' Exhibit S—continued)

within complaint and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are herein stated on his information or belief, and as to those matters ..... believes it to be true.

S. C. HALL

Subscribed and Sworn to before me this 5th day of May, 1939.

ALTHEA K. HINCKLE,

Notary Public in and for said County and State.

My Commission Expires May 20, 1940.

DAVID E. HINCKLE,

called as a witness on behalf of plaintiffs in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: State your name.

A. David E. Hinckle.

Direct Examination

Q. By Mr. Abel: Mr. Hinckle, you are attorney for the defendants in this case?

A. Some of them.

Q. You were attorney for all of them until your withdrawal at the start of the trial, when you withdrew as attorney for Mutual Gold Corporation, and with the exception of Chandis Securities Company?

(Testimony of David E. Hinckle.)

A. That is right, that is right.

Q. You are shown Defendants' Exhibit S. Did you prepare the complaint in that case?

A. Yes, sir.

Q. By the Court: What is it, the usual short form of quiet title complaint? [474]

A. Very much the same, your Honor, with an exhibit consisting of the contract which was being quieted.

The Court: I will examine it afterwards.

Q. By Mr. Abel: With reference to the defendants named as "John Doe No. 1 to No. 500, inclusive," and "Jane Doe No. 1 to 500, inclusive," was it at your suggestion that those John Does were put in as defendants?

A. I dictated them; yes.

Q. And does that apply also to the corporations named as "Corporations No. 1 to 100, inclusive, defendants? A. That is right.

Q. Did you have before you the letter of Mr. Grill on that subject at that time? You are shown Plaintiffs' Exhibit 91, particularly the letter of April 24, 1939 by Mr. Grill to Mr. Garbutt on the subject of whether the stockholders should be made defendants?

A. I don't know, Mr. Abel, whether I ever saw that letter before this trial or not.

Q. The letter just before that, a copy of the letter from Garbutt to Mr. Grill and a copy to Mr. Weller, Mutual Gold attorney at Spokane?

(Testimony of David E. Hinckle.)

A. I think I saw that.

Q. You had that letter. And you notice there with reference to making the stockholders defendants in order to separate the sheep from the goats?

A. Yes; I see that paragraph. [475]

Q. Which class did the dissenting stockholders fall in; were they sheep or were they goats, if you know? A. I don't know.

Q. Under that classification?

A. I regret that I am unable to answer the question.

Q. Did you go up to Leevining and make service upon Russell Collins as statutory agent of Mutual Gold Corporation?

A. I made service on him. I did not go for that purpose, but while I was there I did make the service.

Q. You knew at the time that the complaint was prepared that Mutual Gold was not going to defend the action? A. I probably did. [476]

Q. At that time you knew that a suit was pending in Spokane County, State of Washington?

A. Yes, sir; I did.

Q. Wherein A. P. Bateham, representing the minority stockholders, had sued to quiet title to this same contract in the State of Washington?

A. I did.

Q. And that suit was pending at that time?

A. That is right.

Q. Involving the same contract? [478]

(Testimony of David E. Hinckle.)

A. That is right.

Q. And you knew that that was a representative suit: A. P. Bateham, as a stockholder, suing Mutual Gold and Log Cabin? A. That is right.

Q. To quiet title? A. That is what——

Q. To this same contract?

A. That is what I referred to when I said there was a claim, some claim of Mutual Gold Corporation.

Q. And you knew that that suit was brought by Bateham on behalf of Mutual Gold Corporation?

A. I knew that; and that is what I referred to in my complaint as the claim of the Mutual Gold Corporation.

Q. There was no evidence introduced in support of the decree in the Superior Court?

A. No formal taking of evidence.

Q. I mean in this case, this Los Angeles court?

A. That is what I mean. [479]

FRANK A. GARBUTT,

recalled as a witness in behalf of Defendants, having been previously sworn, testified as follows:

Further Direct Examination

Q. By Mr. Hinckle: Mr. Garbutt, yesterday you testified that your agency for the owners was terminated on November 3, 1938. Have you had an oppor-

(Testimony of Frank A. Garbutt.)
tunity to check that over to see whether it was accurate or not?

A. That was a lapsus linguae. It should have been [484] October.

Q. October 3rd? A. Yes.

Q. 1938? A. Yes. [485]

RUSSELL F. COLLINS,

recalled as a witness in behalf of Defendants, having been previously sworn, testified as follows:

Further Direct Examination

Q. By Mr. Hinckle: Mr. Collins, I will show you a page of the Plaintiffs' complaint, page 7 of the bill of particulars, in which they set out a number of items that were due and owing on September 2nd, or about that time, and ask you—no. I will call your attention to the fact that they total $1,284.93; and then that there are two other items making $550.44, or a total of $1,835.37. I will ask you if those items were due and owing on or about August 6, 1938, or if not all of them, if at least some of them were?

A. Well, I know some of them were due, and that even my own claims the company owed me but they could not pay me even traveling expenses.

Q. How long had this been due?

A. Quite a while. I had taken about $1,500 in stock to supply the money.

(Testimony of Russell F. Collins.)

Q. How long had this been due?

A. Oh, I suppose several months. Some of it, I think, had been due a year or so.

Q. Did the company have the money on August 6, 1938 to pay those claims that were then due?

A. No; they didn't.

Mr. Hinckle: That is all. [488]

Mr. Abel: Is there any contradiction of any of the items?

Mr. Hinckle: None at all.

Mr. Abel: Of that account?

Mr. Hinckle: None at all.

Mr. Anderson: It is covered by stipulation.

Mr. Hinckle: It is covered by stipulation. That is all, Mr. Collins. [489]

PLAINTIFFS' EXHIBIT 94

NOTICE OF ANNUAL MEETING OF STOCKHOLDERS OF MUTUAL GOLD CORPORATION

Notice Is Hereby Given that the annual meeting of the stockholders of Mutual Gold Corporation will be held at the office of the company at 401 Fernwell Building, Spokane, Washington, on February 1st, 1939, at eleven o'clock A. M. in accordance with the by laws of said corporation for the purpose of electing a board of directors for said corporation for the ensuing year, for hearing the reports of officers of said corporation and for the

transacting of any other business that may properly come before said meeting.

MUTUAL GOLD CORPORATION
By E. FUSON
Secretary.

PLAINTIFFS' EXHIBIT 95

(Post card addressed to)

Mutual Gold Corporation,
401 Fernwell Building,
Spokane, Wash.

PROXY

Know All Men By These Presents: That I, the undersigned, do hereby constitute and appoint J. E. Stiegler or in the event of his inability to act, F. T. Hickcox or W. L. Grill, my true and lawful attorney to represent me at the annual meeting of the stockholders of Mutual Gold Corporation to be held on the first day of February, 1939, at eleven o'clock A. M. at the office of the company at 401 Fernwell Building, Spokane, Washington, and do hereby authorize and empower him to vote at said meeting and at any adjournment thereof for me and in my name and stead upon the stock then standing in my name on the books of said company, and I hereby grant my said attorney all the powers that I should possess if personally present at said meeting hereby revoking all former proxies by me made.

Witness, my signature this.....day of January, 1939.

.....

Witnessed By:

.....

A. R. CARTER,

recalled as a witness in behalf of Plaintiffs in rebuttal, having been previously sworn, testified as follows: [498]

Cross Examination

Q. Please state what the paper you now hold is.

A. It is an operating statement from September 1st, 1938 to July 31, 1939 of the Mutual Gold Corporation and the Log Cabin Mines Company. [499]

Q. Does that include such operations as Mr. Garbutt had?

A. Yes; they were all under the control of Mr. Garbutt that are listed on that sheet. [500]

Recross Examination [501]

Q. Did you have charge of the social security records required by law? A. I compiled them.

Q. You compiled them? A. Yes, sir. [502]

Q. During the whole period? A. Yes, sir.

Q. In what name or names was the account carried with the Government?

A. Well, at first it was carried under the name of Frank A. Garbutt for——

(Testimony of A. R. Carter.)

Q. Until when?

A. If I remember right, it was until October 31, 1938.

Q. And after then?

A. From October—or from November 1st to April, 1939, it was carried in the name of Mutual Gold Corporation.

Q. And therefrom?

A. It was carried in the name of the Log Cabin Mines Company. [503]

The Court: I think the findings should also be read in, shouldn't they, in view of the fact that the judgment——

Mr. Hinckle: I was going to ask the Court's leave to read part of the findings, anyway.

Mr. Abel: All right; I will offer the findings.

The Court: And I will read them when I can study this case, without the necessity of reading them now. I assume they are long, and findings usually are when drawn by counsel.

Mr. Hinckle: It is an exemplified copy and we might offer it in evidence. I do not think it will materially clutter the record any more.

The Court: I do not think we have to worry about that much, gentlemen. It is pretty well encumbered now.

Mr. Abel: Well, it is the last straw that breaks the camel's back. If counsel desires to put the whole record in, I have no objection.

Mr. Hinckle: I offer it as defendants' Exhibit. Your Honor, we have to——

The Clerk: Exhibit T. [510]

DEFENDANTS' EXHIBIT T

In the Superior Court of Washington
for Spokane County

No. 103067

J. A. VANCE, VANCE LUMBER COMPANY, a corporation, W. G. PEEBLES, and LOUISE WOODWARD,

Plaintiffs,

vs.

MUTUAL GOLD CORPORATION, a corporation,

Defendant.

SUMMONS

The State of Washington, To the said Mutual Gold Corporation, a corporation, Defendant:

You are hereby summoned to appear, within twenty days (20) after the service of this summons upon you, exclusive of the day of service, and defend the above entitled action in the Court aforesaid, and in case of your failure so to do, judgment will be rendered against you according to the demand of said Complaint, which will be filed in the

(Defendants' Exhibit T—continued)

office of the Clerk of said county, a copy of which is herewith served upon you.

O. C. MOORE,
P. O. Address,
501 Peyton Building,
Spokane, Washington.
W. H. ABEL,
P. O. Address,
Montesano, Washington
Attorneys for Plaintiffs.

[Endorsed]: Filed Feb. 28, 1939. Frank C. Nash, Clerk.

[Title of Superior Court and Cause.]

COMPLAINT

Plaintiffs complain of defendant, and for their several causes of action herein allege:

I.

At all times herein mentioned Vance Lumber Company has been and is a corporation, duly organized under and by virtue of the laws of the State of Washington; that it has paid its license fees last due unto the State.

II.

At all times herein mentioned Mutual Gold Corporation, defendant herein, has been and still is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

(Defendants' Exhibit T—continued)

III.

About the year 1932, defendant, as vendee, acquired a certain mining property (hereinafter referred to as the mine) in Mono County, California. That its contract of purchase required it to prospect, develop and operate the mine. Prior to, and since August, 1936, defendant expended large sums of money in opening up, developing, and making said mine valuable, and thereby, and with the funds borrowed on production notes as hereinafter alleged, said mine became and was of great and substantial value, capable of continuous and productive operation with large and substantial profit to defendant.

IV.

About August, 1936, defendant was in need of funds to fully develop and operate the mine, and thereupon borrowed from J. A. Vance $8,000, from Vance Lumber Company $6,000, from W. G. Peebles $1,000, and from Louise Woodward $1,000, for and on account of which the defendant duly executed production notes to J. A. Vance for $8,000, to Vance Lumber Company for $6,000, to W. G. Peebles for $1,000, and to Louise Woodward for $1,000, which Mutual Gold Corporation jointly and severally promised to pay according to the terms of said production notes. That said notes were upon a common form, a true copy of which is attached hereto, marked Exhibit "A" and made a part hereof, the only difference being in the amount of said notes, depending upon the amount of the loan, and

(Defendants' Exhibit T—continued)

therein and thereby the defendant promised to pay the several note holders the amount of their respective notes according to the tenor thereof. Each production note provided defendant would, and it agreed to, pay such note in the amount expressed thereon, being the amount of said loan, and provided, inter alia:

> " . . . out of net production receipts accruing from the sale of ores from its mining property, before any dividends shall be declared or paid by it upon its capital stock, and in no other manner whatsoever, except that in case of a voluntary or involuntary sale of its mining property, any balance unpaid thereon shall be paid out of the proceeds thereof before any distribution shall be made to its stockholders.
>
> " 'Net production receipts' hereinbefore referred to shall be construed to mean such receipts as shall remain after deducting therefrom all of the costs of producing, handling, and milling said ore, necessary corporation expenses and taxes, a reasonable sum for mine development, such sum as the board of directors shall determine may be necessary for the purchase and/or payment of necessary mining equipment and payments on account of the purchase price of said mining property by royalty or otherwise."

V.

As an inducement to the plaintiffs, and to each of the persons loaning money for and upon said

(Defendants' Exhibit T—continued)

production notes, the defendant agreed that the holders of said production notes were to select a manager to operate the mine, and that pursuant thereto, the plaintiff J. A. Vance was so selected and appointed manager under a written contract of management, a true copy of which is hereto attached, marked Exhibit "B", and made a part hereof.

VI.

The defendant in all borrowed about $30,000 on production notes, as aforesaid, and executed notes accordingly, and the funds derived from said production notes were actually used in the development and operation of the mine, and were substantially all expended by the summer of 1938, at which time the funds of defendant for development and operation were exhausted.

VII.

September 2, 1938, defendant, without the knowledge or consent of plaintiffs, fraudulently and without consideration wrongfully and unlawfully deeded, conveyed, and disposed of said mine to Frank A. Garbutt, and thereby ousted J. A. Vance as manager, and thereby disabled itself permanently so that it could not perform the management contract, or pay, or ever be in a position to pay the production notes, and put it out of its power to obtain the net receipts or any receipts of the mine. At said time, the mine was valuable, with large amounts of valuable ore, substantially blocked out, and capable of being mined and milled at a sub-

(Defendants' Exhibit T—continued)

stantial profit, and sufficient to pay and discharge the production notes, and all thereof, out of net receipts, as defined in the notes.

VIII.

By the said acts of defendant, each of the plaintiffs has been damaged in the full amount of the production notes severally held by them, and each of them claim damage as follows: J. A. Vance, $8,000; Vance Lumber Company, $6,000; W. G. Peebles, $1,000; Louise Woodward, $1,000, together with interest thereon from September 2, 1938, at the legal rate.

Wherefore plaintiffs pray judgment against the defendant as follows:

(1) In favor of J. A. Vance in the sum of $8,000, with interest as above alleged;

(2) In favor of Vance Lumber Company in the sum of $6,000, with interest as above alleged;

(3) In favor of W. G. Peebles in the sum of $1,000, with interest as above alleged;

(4) In favor of Louise Woodward in the sum of $1,000, with interest as above alleged;

(5) And for their costs of suit herein.

O. C. MOORE and
W. H. ABEL
Attorneys for Plaintiffs

Office and Post Office Addresses:
O. C. MOORE
Peyton Building
Spokane, Washington
W. H. ABEL
Montesano, Washington

(Defendants' Exhibit T—continued)

State of Washington
Grays Harbor County—ss.

J. A. Vance, being first duly sworn, on oath deposes and says: That he is one of plaintiffs herein, and makes this verification for and on behalf of each of said plaintiffs, having authority so to do; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

J. A. VANCE

Subscribed and Sworn to before me this 18th day of February, 1939.

ELAINE VEYSEY
Notary Public in and for Washington
Residing at Montesano, Washington

EXHIBIT "A"

"No..... $.....

"Spokane, Washington

"For Value Received, the undersigned, a Washington corporation, agrees to pay to..... the sum of.....Dollars, without interest, out of net production receipts accruing from the sale of ores from its mining property, before any dividends shall be declared or paid by it upon its capital stock, and in no other manner whatsoever, except that in case of a voluntary or involuntary sale of its mining property, any balance unpaid hereon shall be paid out of the pro-

(Defendants' Exhibit T—continued)

ceeds thereof before any distribution shall be made to its stockholders.

" 'Net production receipts' hereinbefore referred to shall be construed to mean such receipts as shall remain after deducting therefrom all of the costs of producing, handling and milling said ore, necessary corporation expenses and taxes, a reasonable sum for mine development, such sum as the Board of Directors shall determine may be necessary for the purchase and/or payment of necessary mining equipment, and payments on account of the purchase price of said mining property, by royalty or otherwise.

"All sums which the undersigned shall have for the retirement of this and similar certificates shall be applied pro rata upon the same.

"The execution of this certificate has been authorized by resolution of the Board of Directors.

"Dated this..... day of....., 1936.

"MUTUAL GOLD
CORPORATION

"By .....
President

"Attest:

.....
Secretary"

(Defendants' Exhibit T—continued)

EXHIBIT "B"

This agreement, made and entered into this 29th day of August, 1936, by and between Mutual Gold Corporation, a corporation, party of the first part, and J. A. Vance, party of the second party, Witnesseth:

That Whereas, the party of the first part is contemplating the raising of approximately the sum of $30,000 to place its mining property, located near Mono Lake, California, in operation; and

Whereas, the party of the second part has agreed to assist in the raising of said amount to the extent which he has heretofore advised the board of directors of the party of the first part; and

Whereas, the party of the first part has agreed, if said fund is raised, the party of the second part shall serve as general manager under certain terms and conditions; now, therefore,

It Is Agreed as follows, to-wit:

That the party of the second part is hereby employed as general manager of the party of the first part, with full and complete authority for and on behalf of the party of the first part to expend the sum of $30,000 to place the mine of the party of the first part in production and to pay such obligations which shall have been incurred by the company in connection with said property during the months of August and September, 1936.

That the party of the second part shall remain as general manager of the party of the first part

(Defendants' Exhibit T—continued)

after the said mine shall have been placed in production and during the operation of said mine until such time as the said sum of $30,000 shall have been fully repaid to parties advancing said funds to the party of the first part, in accordance with the terms of such agreement as shall be made by first party with parties advancing said funds.

That the party of the second part shall serve without any compensation whatsoever, except that he shall be entitled to full reimbursement for all expenses which he shall incur in connection with his position as general manager, which said expenses shall be paid monthly.

The party of the second part shall employ M. J. Keily as a mining engineer upon said property if he is able to make satisfactory arrangements with him; but if not, party of the second part shall have the right to employ such mining engineer as he may select with the approval of the board of directors of the first party.

That in the event of the death, resignation or inability of the party of the second part to act as the general manager, those subscribing for the said sum of $30,000 shall have the right to designate a new general manager and the party of the first part agrees to employ such general manager as may be designated; and in connection with the designation of such general manager, if those raising said funds are unable to agree in the selection of the general manager, those advancing a majority in amount of

(Defendants' Exhibit T—continued)

the funds shall have the right to designate the new general manager to be appointed in the place and stead of the said party of the second part.

That the said funds so raised for the purpose of placing the said mine in production shall be placed in a special fund of said corporation and may be withdrawn only upon the check of the party of the second part for and on behalf of said corporation, or such other party as the party of the second part may designate; but in the event that the party of the second part shall designate any other person, except G. F. Ferbert or such other party as may be suitable to first party, to withdraw said funds, the party of the second part shall be responsible for the withdrawal thereof.

That the party of the second part shall incur no personal liability for any matter or thing whatever which he may do for and on behalf of this corporation while acting under the terms of this contract, and as general manager of said corporation, and shall incur no personal liability for any contracts or obligation which he may incur for and on behalf of the party of the first part, while acting as general manager of the party of the first part, nor shall second party be liable for any mistakes or errors in judgment or any omissions of any character while acting as general manager of the first party as herein provided.

In Witness Whereof, we have hereunto set our hands and seals the day and year in this instrument

(Defendants' Exhibit T—continued)

first above written.

MUTUAL GOLD
CORPORATION

(Signed) By J. E. STIEGLER
President

(Signed) Attest: E. FUSON,
Secy.
First Party

(Signed) J. A. VANCE
Second Party

The foregoing contract is hereby approved by the following as directors of Mutual Gold Corporation, a corporation.

(Signed) J. E. STIEGLER
(Signed) W. L. GRILL
(Signed) RUSSELL F. COLLINS
(Signed) J. A. VANCE
(Signed) R. P. WOODWORTH
(Signed) FRED P. FREEMAN

[Endorsed]: Filed Feb. 28, 1939.

[Title of Superior Court and Cause.]

AMENDED ANSWER

Comes Now the defendant and for answer to the complaint of plaintiff herein alleges:

I.

Admits paragraphs I and II of said Complaint.

(Defendants' Exhibit T—continued)

II.

Admits that part of paragraph III of said complaint up to and including the words "and making said mine valuable" in line four on page two of said complaint, and admits that said mine was of considerable potential value and capable of productive operation under proper management and denies each and every other allegation, matter and thing in said paragraph III.

III.

Answering paragraph IV, defendant admits that it borrowed from J. A. Vance the sum of $2,666.66, and no more; from Vance Lumber Company, the sum of $2,000.00, and no more; from W. G. Peebles the sum of $333.33, and no more; and from Louise Woodward, the sum of $333.33, and no more, and admits the remaining allegations of said Paragraph IV.

IV.

Admits paragraph V of said Complaint.

V.

Answering paragraph VI of plaintiffs' complaint, defendant denies that it borrowed the sum of $30,000.00 as alleged in said complaint, or any sum in excess of the sum of $10,000.00, and admits the remaining allegations of said paragraph VI.

VI.

Denies each and every allegation, matter and thing set forth in paragraph VII of said Complaint save

(Defendants' Exhibit T—continued)

as the same may be hereafter specifically admitted.

VII.

Denies each and every allegation, matter and thing set forth in paragraph VIII and specifically denies that the said plaintiffs have been damaged in the various amounts set forth in said paragraph or at all.

And for Further Answer and by Way of Affirmative Defense, defendant alleges:

I.

That in the month of July, 1932, plaintiff, J. A. Vance, was elected a director and a Vice President of defendant company and remained a director and Vice President continuously thereafter until the month of September, 1938.

II.

That plaintiff, J. A. Vance, from and after July, 1932, assumed and took over general charge of the mining property purchased by defendant and purchased machinery and a mill to be used on said property and superintended the construction of said mill and the placing of said machinery.

III.

That although plaintiff claimed to have great ability and knowledge regarding mining machinery and mills, having previously been engaged in the saw mill business, he purchased and had transported

(Defendants' Exhibit T—continued)

to defendant's property, at great expense to defendant, a second hand stamp mill, which was totally inadequate to perform the work required of it, plaintiff having wholly failed to determine the kind of mill necessary to properly handle and mill the ores from defendant's property so as to effect the best possible saving of values therefrom, and purchased and had transported to the property of defendant at great expense to defendant, a second hand Diesel Engine, which ran backwards and had to be entirely worked over to be usable for the purpose for which it was intended and which has ever since given much trouble in its operation, and is of no practical value to defendant.

IV.

That although plaintiff claimed to be an expert in the construction of mills and installation of machinery, he insisted on and did build said mill and install the machinery on defendant's property contrary to the advice of expert mining engineers and millwrights furnished by defendant so that the same was so expensive to operate and so ineffectual in the saving of values from the ores milled that the cost to defendant company for the ores mined and milled exceeded the values extracted and saved therefrom by the plaintiffs' operations.

V.

That by reason of the foregoing allegations in this defense set forth, the finances of defendant com-

(Defendants' Exhibit T—continued)

pany were exhausted and it was forced thereby to suspend operations in 1938.

VI.

That at a meeting of the stockholders of defendant company on August 6th, 1938, at which meeting plaintiff, J. A. Vance, was personally present, and the three remaining plaintiffs all being stockholders of defendant were represented by their proxies and after a full discussion of the affairs of the defendant company, financial and otherwise, the following resolution was passed by the unanimous vote of all stockholders represented at said meeting, to-wit:

> "Resolved that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, deal with, operate, exchange or otherwise dispose of, to any person, persons or corporation desiring to purchase, lease, deal with, exchange, operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection which in their judgment they may deem necessary or advisable."

(Defendants' Exhibit T—continued)

VII.

That in accordance with the authority vested in them by said resolution, the board of directors of defendant company, acting in their discretion and best judgment entered into a contract with one Frank A. Garbutt of Los Angeles, California, for the operaiton of said mining property, a true copy of said contract being marked Exhibit "A" attached hereto and made a part hereof as though set out in full herein.

For a Second Affirmative Defense and by Way of Set Off and Counter Claim, Defendant alleges:

I.

That the defendant borrowed from the plaintiff herein in the fall of 1937, the following sums of money, to-wit:

From plaintiff, J. A. Vance, the sum of $2,666.66

From plaintiff, Vance Lumber Company, the sum of $2,000.00

From plaintiff, W. G. Peebles, the sum of $333.33, and

From plaintiff, Louise Woodward, the sum of $333.33

and that defendant at the time of borrowing the said money from the various plaintiffs above named, executed and delivered to said plaintiffs the said production notes, as follows:

(Defendants' Exhibit T—continued)

To plaintiff, J. A. Vance, a note in the sum of $8,000.00

To plaintiff, Vance Lumber Company, a note in the sum of $6,000.00

To plaintiff, W. G. Peebles, a note in the sum of $1,000.00, and

To plaintiff, Louise Woodward, a note in the sum of $1,000.00

II.

That the said notes so executed and delivered by defendant to the various plaintiffs were usurious and that defendant is entitled to have set off against the amounts actually loaned by plaintiffs to defendant the amount of said note in excess of the amount of the loan made by each of plaintiffs to defendant.

Wherefore, defendant prays that plaintiffs take nothing by their complaint herein; that said action be dismissed and that defendant have judgment against plaintiffs for its taxable costs therein incurred.

BROWN & WELLER
Attorneys for Defendant.

State of Washington
County of Spokane—ss.

C. T. Orr, being first duly sworn upon his oath, deposes and says:

That he is Secretary of the defendant Company; that he has read the above and foregoing Amended

(Defendants' Exhibit T—continued)

Answer; knows the contents thereof and that the same is true as he verily believes.

C. T. ORR.

Subscribed and Sworn to before me this 20th day of May, 1939.

E. D. WELLER

Notary Public in and for the State of Washington, residing at Spokane.

Copy received this 20 day of May, 1939.

O. C. MOORE

Attorneys for Ptfs.

[Endorsed]: Filed May 23, 1939. Frank C. Nash, Clerk.

EXHIBIT "A"

Memorandum of Agreement between Mutual Gold Corporation, organized under the laws of the State of Washington, with its principal place of business at Spokane, and operating solely near Leevining, Mono County, California, hereinafter called the Seller, and Frank A. Garbutt, of Los Angeles, hereinafter called the Buyer, Witnesseth:

The Seller, through its duly authorized representatives, states to the Buyer that it requires further equipment to make said property properly profitable as follows:

(Defendants' Exhibit T—continued)

1.	Bringing in electric power from Leevining or Tioga Lodge, 2½ miles	$11,000.00
2.	Electric hoist complete with motor and starter, etc.	7,000.00
3.	Cage or skip and mine cars	1,500.00
4.	Ball mill, 100 tons capacity, including motor, etc.	7,000.00
5.	Classifier complete	3,000.00
6.	Cyanide equipment, including tanks, motor and equipment capable of handling 100 tons daily	25,000.00
7.	6 inch pipe line, 5000 feet and installation thereof, to carry tailings to impounding dam	3,000.00
8.	500 cubic foot compressor, with motor, etc.	4,000.00
9.	Additional building to house new machinery, including coverage for cyanide tanks	3,000.00
10.	New bunkhouse and addition to cook house	1,500.00
11.	Assay office and equipment	1,000.00
12.	Enlargement of present ore bins at shaft and mill	1,000.00
13.	Payroll, truck hauling, cement, sand, etc. for 60 days during installation of above	10,000.00
14.	Payment due on property Nov. 1, 1938	10,000.00
	Total	$84,000.00

The Seller and Buyer agree to co-operate in investigating and determining whether more suitable milling equipment than that above described and recommended by the Seller can be obtained and if, in the opinion of the Buyer, such proves to be the case, he may, at his option, alter the specifications of the milling equipment accordingly.

(Defendants' Exhibit T—continued)

The Seller agrees to sell to the Buyer and to forthwith transfer to him the contract owned by it dated July 13, 1932 with the Chandis Securities Company, M. N. Clark and Alice Clark Ryan for the purchase of the Log Cabin Mine and the group of mining claims contiguous thereto, subject to all modifications of said contract, which contract and its modifications are, for the purposes of description and otherwise, hereby made a part hereof; included in this sale are all other property, personal and real, belonging to the Seller now on or adjacent or tributary to, or used in connection with said Log Cabin Mine and its group.

The Seller agrees to forthwith transfer its title to said property, real and personal, to Frank A. Garbutt.

In consideration of this agreement and the transfer above set forth, the Buyer agrees to do the following things:

1. Furnish $10,000 to make the payment due the owners of the Log Cabin Mine November 1st, 1938, before its due date.

2. Organize as soon as possible a corporation of such Capital Stock as he may desire and forthwith transfer to said Corporation all titles received by him hereunder as soon as said Corporation is qualified to hold same, issuing all of its Capital Stock fully paid therefor.

As a part of the consideration for the transfer of said title to it, such corporation shall contempora-

(Defendants' Exhibit T—continued)

neously therewith or immediately thereafter agree that it will not sell or part with the title to any real estate referred to herein nor any part thereof, without either (a) the written consent of the Seller herein; or (b) the vote of a majority of the directors of the corporation duly authorized or approved by its stockholders; or (c) its bankruptcy; or (d) a two thirds vote of its stockholders; and the By-Laws will carry a clause substantially setting forth this condition in the language above and that this provision of the By-Laws shall not be amended except by the vote of sixty (60%) per cent of the outstanding stock or a unanimous vote of the entire board of directors.

3. Forthwith transfer one-half of its total authorized Capital Stock less one controlling share, to the Seller, which stock shall carry with it the right to a full minority representation on the board of directors of the corporation to be formed.

4. Furnish additional funds to minimum of $100,000, including the above mentioned $10,000 to said corporation to be formed, as needed by it to equip said Log Cabin Mine with a mill of an estimated capacity of one hundred (100) tons daily or more, a suitable hoist and to bring in electrical power, and for such other equipment and supplies as appear advisable including payment of taxes and the protection of titles.

5. Take care of all further payments falling due to the owners of said Log Cabin Mine group amounting to $120,000 in all.

(Defendants' Exhibit T—continued)

6. Proceed with the work of properly equipping said property as rapidly as conditions will permit unless prevented by weather, strikes or other circumstances not controlled by the Buyer.

7. At the Buyer's option to advance additional funds should such advances, in the opinion of the Buyer, become necessary or advisable.

8. Furnish the Seller with proper and detailed monthly statements of the operations of the Corporation to be formed.

9. The Buyer agrees to co-operate with the Seller in any reasonable way in protecting its and its stockholders' interest in order that the smallest shall receive benefits proportionate to the largest.

For all advances made by him the Buyer shall be entitled to be repaid out of any profits or funds available from the operation of said property or sale or other disposition of the property, but not otherwise.

When the Buyer has performed all acts hereinabove set forth which are obligatory hereunder he shall be deemed to have fulfilled this contract and his liability shall cease.

The Buyer may also terminate his liability hereunder at any time after furnishing the first $10,000 specified herein by notifying the Seller of his desire so to do and by placing his fifty (50%) per cent of the stock plus the one controlling share obtained by the Buyer hereunder, in escrow with the Title Insurance and Trust Company or with any responsible bank selected by the Buyer with irrevocable

(Defendants' Exhibit T—continued)

instructions to deliver it to the Seller whenever and as soon as the money from net profits or from its dividends or from the Seller sufficient to repay the Buyer has been received by the trustee for the benefit of the Buyer. And should the Buyer (or, in event of his death, his estate) fail from any cause to perform his part of this agreement he hereby agrees to deposit said stock in escrow in the same manner as in this paragraph provided and under the same terms and conditions as though the Buyer were terminating his liability. Should said Buyer withdraw as above or fail to perform his agreement as above provided, the Seller shall have the right to elect a majority of the board of directors, and such board shall have the right to immediately elect new officers, both conditional upon (a) the repayment to the Buyer of the monies advanced by him, or (b) the securing of same by a first lien upon the assets of the corporation subject only to its contract of purchase of July 13, 1932, or, at the option of the Buyer he may elect at any time before or while said stock is in escrow to accept in full payment for all money advanced by him such pro rata of said stock as said advances bear to one hundred thousand dollars. While the Buyer retains such control he agrees to vote upon all matters arising as appears to the best interests of the corporation.

It is the intention of both the Seller and Buyer that in event of such withdrawal by the Buyer he shall be entitled to the return of his advances out

(Defendants' Exhibit T—continued)

of profits only or out of funds derived from the sale of said property or from the sale of the stock obtained by the Seller hereunder should the Seller sell the property or stock to third parties after having obtained title thereto by reason of the withdrawal of the Buyer.

This right to repayment shall extend only for such advances as are made in accordance with this contract and the Buyer herein shall not be entitled to repayment for any further or additional advances unless or until he has secured the written approval of the Seller thereto. In computing net profits actual operating expenses only shall be considered and no charge shall be made on account of officers' salaries, interest or capital expenditures.

While such stock is in escrow it shall be voted by the Buyer, and its dividends shall go to the Buyer until his advances have been repaid and any dividends received by him shall apply upon such repayment.

The Buyer, or his representatives, will consult at all reasonable times with the Seller before making any unusual or extraordinary outlays not contemplated herein and further agrees, insofar as his control of the enterprise is concerned, to use his best judgment in carrying on the operations contemplated.

In Witness Whereof the said Seller has hereby caused its name to be subscribed by its President thereunto duly authorized by its Board of Directors

(Defendants' Exhibit T—continued)

this 2nd day of September, 1938, and its official seal to be affixed, and the said Buyer has hereunto subscribed his name and affixed his seal as of the date aforesaid.

MUTUAL GOLD
CORPORATION

(Signed) By: J. E. STIEGLER
President

(Signed) FRANK A. GARBUTT

[Title of Superior Court and Cause.]

AMENDED REPLY

Comes Now the plaintiffs and reply to the amended answer in the above entitled cause and the so called affirmative defenses therein alleged.

As to the first so called further answer and affirmative defense plaintiffs reply,

I.

Deny the matters and things set forth and alleged in the first so called further answer and affirmative defense and the whole thereof, other and except that from July, 1932, until September, 1938, plaintiff J. A. Vance was a director and vice president of the Mutual Gold Corporation; that on August 6, 1938, at a meeting of the stockholders of defendant Mutual Gold Corporation a resolution was adopted, of which a copy is set forth in paragraph VI of said affirmative defense; that on or about September 2,

(Defendants' Exhibit T—continued)

1938, a purported contract, of which a copy is attached as Exhibit A to the amended answer, without authority therefor, was signed by J. A. Stiegler, wrongfully purporting to act in his capacity as president and by authority of defendant corporation.

As to the second so called further answer and affirmative defense plaintiffs reply,

I.

Deny the matters and things set forth and alleged in the second so called affirmative defense, set off and counter claim, other and except that defendant borrowed from plaintiffs the amounts of money alleged in said second so called affirmative defense, together with other sums and amounts totaling the full amount alleged in the complaint herein.

For a Further and Affirmative Reply to the further and affirmative matters alleged in the amended answer, plaintiffs allege that the pretended contract of September 2, 1938 was and is wholly without consideration and was not and is not authorized by the resolution of August 6, 1938, set forth in the amended answer, and was and is a part and in furtherance of a fraudulent plan to deprive plaintiffs of their assets whereby, for the advantage and enrichment without consideration of said Frank A. Garbutt and his associates, the names of whom are unknown to plaintiffs, defendant Mutual Gold Corporation, was brought, apparently as purported

(Defendants' Exhibit T—continued)

seller, but falsely and fraudulently in fact to agree, as stated on page 2 of said Exhibit A, "to forthwith transfer its title to said property, real and personal, to Frank A. Garbutt," and plaintiffs further allege; that said pretended contract was subsequently abandoned and repudiated by said Frank A. Garbutt and that no corporation was formed or organized or pretended to have been organized thereunder or pursuant thereto.

For a Second Affirmative Reply unto the amended answer, and each and every part thereof, the plaintiffs allege:

I.

That at the meeting at which the resolution of August 6, 1938, was adopted, and immediately prior to such adoption, and for the purpose of inducing the adoption of such resolution, Russell F. Collins and G. H. Ferbert, each a director of Mutual Gold Corporation and acting as such, stated and represented to the stockholders of Mutual Gold Corporation, in meeting assembled, that it was desirable that a wide discretion be given to the Board of Directors to dispose of the assets of the corporation, and that the Board of Directors would thereby be enabled to obtain a better disposition of the assets, and that such disposition would include protection to the creditors, including the production note holders (including the plaintiffs herein); said statements and representations were made with intent to thereby deceive and mislead the stockholders

(Defendants' Exhibit T—continued)

so that they would adopt said resolution, and they were deceived and misled thereby and thereupon adopted said resolution. Said statements and representations were made with no intention that the creditors or production note holders be protected or payment of their obligations provided for, and with the fraudulent intent to thereafter convey to Frank A. Garbutt without consideration the assets of the corporation, and intentionally disabled Mutual Gold Corporation from paying its creditors, including the production notes, and including therein the production notes in suit.

For a Third Affirmative Reply unto the answer, and each portion thereof, plaintiffs allege, by way of estoppel,

I.

That by the management contract, pleaded as Exhibit B to the complaint, J. A. Vance was to serve without compensation as manager and was to incur no personal liability for any matter or thing whatever which he might do for and on behalf of the defendant while acting as general manager of the defendant corporation, and was not to be liable for any mistakes or errors in judgment or any omissions of any character while acting as general manager of Mutual Gold Corporation.

II.

That from time to time, the management of the said J. A. Vance and his conduct and acts done as

(Defendants' Exhibit T—continued)

general manager were impliedly, and in part expressly approved and ratified by Mutual Gold Corporation, in that at the annual meeting of the stockholders of Mutual Gold Corporation held February 3, 1937, a vote of thanks was extended to him for his services on behalf of the Company; and at the meeting of the Board of Directors held October 9, 1937, a resolution was unanimously adopted thanking the said J. A. Vance for what he had done for the Company; that the Board of Directors at a meeting held February 19, 1938, approved the activities at the mine of J. A. Vance for the period from May 7, 1937, to December 12, 1937, said approval being in the following form:

> "Mr. J. A. Vance presented a written report covering the activities at the mine from May 7, 1937, to December 12, 1937, when he left. Said report was duly read and submitted to the Board of approval before sending out to the stockholders. On motion duly made, seconded and carried, the report was ordered accepted."

III.

That the management contract, Exhibit B attached to complaint, provided that the said J. A. Vance would employ M. J. Keily as mining engineer upon said property; that M. J. Keily was nominated and appointed by the owners as their representative to be employed by Mutual Gold Corporation at said mine to have supervision and direction of the development of said mine, and the

(Defendants' Exhibit T—continued)

operation of the mill and recovery of values thereat, and the authority of J. A. Vance as general manager was so limited that he did not have a free hand as such manager, but that by action and resolution of the Board of Directors of Mutual Gold Corporation, at a meeting held January 8, 1938, Keily was given complete charge to hire and fire men and complete responsibility as to the operation of the property; that any of the acts and things complained of as mismanagement were done upon the authority and with the approval of Keily and on account of all thereof the defendant, Mutual Gold Corporation, is now estopped and precluded to complain thereof, or to hold J. A. Vance responsible therefor.

Wherefore plaintiffs pray judgment as in their complaint herein.

O. C. MOORE and
W. H. ABEL
Attorneys for Plaintiffs.

State of Washington,
County of Spokane—ss.

O. C. Moore, being first duly sworn on oath, deposes and says:

That he is one of the attorneys for the plaintiffs and makes this affidavit for and on behalf and for the reason that said plaintiffs are and each of them is a non-resident of Spokane County.

(Defendants' Exhibit T—continued)

Affiant further states that he has read the foregoing reply, knows the contents thereof and believes same to be true.

O. C. MOORE.

Subscribed and sworn to before me this 24th day of June, 1939.

R. P. WOODWORTH,

Notary Public in and for the State of Washington, residing in Spokane.

[Endorsed]: Filed June 26, 1939.

[Title of Superior Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action having come on for trial October 5th, 1939, before the undersigned, one of the Judges of the above-entitled court, and the plaintiffs being present in court personally and by the officers of plaintiff corporation and represented by their attorneys, W. H. Abel and O. C. Moore, and the defendant being present by its officers and by its attorneys, D. B. Heil and E. D. Weller, and both parties having announced ready for trial, and it being stipulated in open court by respective counsel for plaintiffs and defendant that the trial of this cause should be consolidated for trial before the court with the case of J. A. Vance vs. Mutual Gold Corporation, No. 103068, in said court, and the

(Defendants' Exhibit T—continued)

court having heard the testimony of witnesses for plaintiffs and for defendant, and the argument of counsel, being fully advised in the premises, now makes the following

FINDINGS OF FACT

I.

That plaintiff, Vance Lumber Company, now is, and at all times herein mentioned was, a corporation organized under the laws of the State of Washington, and that it has paid its license fee last due the State of Washington.

II.

That defendant, Mutual Gold Corporation, now is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Washington.

III.

That at all times hereafter mentioned up to September, 1938, plaintiff J. A. Vance was a stockholder, a member of the Board of Directors, and a Vice-President of defendant company.

IV.

That about the year 1932 defendant as vendee acquired by contract of purchase certain mining property situate in Mono County, California, for

(Defendants' Exhibit T—continued)

the total purchase price of $150,000, $10,000 of which purchase price had been paid prior to August, 1936, and that the purchase contract as amended provided for the payment of $10,000 November 1, 1937, and a like sum on November 1st of each year thereafter until November 1st, 1941, when the entire balance became due and payable. That said contract required that the vendee, defendant herein, should prospect and develop said mining property and that defendant had spent considerable sums of money up to August, 1936, in such prospecting and development work to the extent that its financial resources had become exhausted.

V.

That about August, 1936, defendant being in need of funds to continue development of said mine and for prospecting same, pursuant to authorization of the Board of Directors, borrowed approximately $30,000 from plaintiffs herein and other stockholders of defendant corporation and delivered to the several stockholders by whom such loans were made, its notes designated by it as "production notes." That said notes were on a common form, differing only as to the amount of loan represented thereby, said form being as follows:

(Defendants' Exhibit T—continued)

"No.....

$.....

"Spokane, Washington

"For Value Received, the undersigned, a Washington corporation, agrees to pay to ..... the sum of..... Dollars, without interest, out of net production receipts accruing from the sale of ores from its mining property, before any dividends shall be declared or paid by it upon its capital stock, and in no other manner whatsoever, except that in case of a voluntary or involuntary sale of its mining property, any balance unpaid hereon shall be paid out of the proceeds thereof before any distribution shall be made to its stockholders.

"'Net production receipts' hereinbefore referred to shall be construed to mean such receipts as shall remain after deducting therefrom all of the costs of producing, handling and milling said ore, necessary corporation expenses and taxes, a reasonable sum of mine development, such sum as the Board of Directors shall determine may be necessary for the purchase and/or payment of necessary mining equipment, and payments on account of the purchase price of said mining property, by royalty or otherwise.

"All sums which the undersigned shall have

(Defendants' Exhibit T—continued)

for the retirement of this and similar certificates shall be applied pro rata upon the same.

"The execution of this certificate has been authorized by resolution of the Board of Directors.

"Dated this.....day of....., 1936.

"MUTUAL GOLD CORPORATION

"By .....

President.

"Attest:

.....

Secretary"

That plaintiffs loaned to defendant and hold production notes as hereinbefore described in the following amounts:

J. A. Vance	$8000.00
Vance Lumber Company	6000.00
W. G. Pebbles	1000.00
Louise Woodward	1000.00

VI.

That plaintiff, J. A. Vance, as a condition for making such loans by himself and by the Vance Lumber Company, of which he was an officer and a large stockholder, required that he be selected as manager of defendant company to operate said mine, and pursuant thereto defendant entered into a contract with the said J. A. Vance as follows:

"This agreement, made and entered into this 29th day of August, 1936, by and between Mu-

(Defendants' Exhibit T—continued)

tual Gold Corporation, a corporation, party of the first part, and J. A. Vance, party of the second part, Witnesseth:

"That Whereas, the party of the first part is contemplating the raising of approximately the sum of $30,000. to place its mining property, located near Mono Lake, California, in operation; and

"Whereas, the party of the second part has agreed to assist in the raising of said amount to the extent which he has heretofore advised the board of directors of the party of the first part; and

"Whereas, the party of the first part has agreed, if said fund is raised, the party of the second part shall serve as general manager under certain terms and conditions; now, therefore,

"It Is Agreed as follows, to-wit:

"That the party of the second part is hereby employed as general manager of the party of the first part, with full and complete authority for and on behalf of the party of the first part to expend the sum of $30,000 to place the mine of the party of the first part in production and to pay such obligations which shall have been incurred by the company in connection with said property during the months of August and September, 1936.

"That the party of the second part shall remain as general manager of the party of the

(Defendants' Exhibit T—continued)

first part after the said mine shall have been placed in production and during the operation of said mine until such time as the said sum of $30,000 shall have been fully repaid to parties advancing said funds to the party of the first part, in accordance with the terms of such agreement as shall be made by first party with parties advancing said funds.

"That the party of the second part shall serve without any compensation whatsoever, except that he shall be entitled to full reimbursement for all expenses which he shall incur in connection with his position as general manager, which said expenses shall be paid monthly.

"The party of the second part shall employ M. J. Keily as a mining engineer upon said property if he is able to make satisfactory arrangements with him; but if not, party of the second part shall have the right to employ such mining engineer as he may select with the approval of the board of directors of the first party.

"That in the event of the death, resignation or inability of the party of the second part to act as the general manager, those subscribing for the said sum of $30,000 shall have the right to designate a new general manager and the party of the first part agrees to employ such general manager as may be designated; and in connection with the designation of such general manager, if those raising said funds are unable

(Defendants' Exhibit T—continued)

to agree in the selection of the general manager, those advancing a majority in amount of the funds shall have the right to designate the new general manager to be appointed in the place and stead of the said party of the second part.

"That the said funds so raised for the purpose of placing the said mine in production shall be placed in a special fund of said corporation and may be withdrawn only upon the check of the party of the second part for and on behalf of said corporation, or such other party as the party of the second part may designate; but in the event that the party of the second part shall designate any other person, except G. F. Ferbert or such other party as may be suitable to first party, to withdraw said funds, the party of the second part shall be responsible for the withdrawal thereof.

"That the party of the second part shall incur no personal liability for any matter or thing whatever which he may do for and on behalf of this corporation while acting under the terms of this contract, and as general manager of said corporation, and shall incur no personal liability for any contracts or obligation which he may incur for and on behalf of the party of the first part, while acting as general manager of the party of the first part, nor shall second party be liable for any mistakes or errors in judgment or any omissions of any character

(Defendants' Exhibit T—continued)

while acting as general manager of the first party as herein provided.

"In Witness Whereof, we have hereunto set our hands and seals the day and year in this instrument first above written.

(Signed) MUTUAL GOLD CORPORATION
By J. E. STIEGLER,
President.

(Signed) Attest: E. FUSON,
Secy.
First Party.

(Signed) J. A. VANCE,
Second Party.

"The foregoing contract is hereby approved by the following as directors of Mutual Gold Corporation, a corporation.

(Signed) J. E. STIEGLER
(Signed) W. L. GRILL
(Signed) RUSSELL F. COLLINS
(Signed) J. A. VANCE
(Signed) R. P. WOODWORTH
(Signed) FRED P. FREEMAN"

VII.

That operating under said contract said plaintiff, J. A. Vance, took sole charge of the said mine and the expenditure of the $30,000, which was placed in a special fund in a bank at Bishop, California, subject only to his check and the check of others authorized by him. That at the time plain-

(Defendants' Exhibit T—continued)

tiff, J. A. Vance, took charge of operations at said mining property, there was on the property a small mill suitable primarily as a pilot mill for development purposes which said plaintiff Vance assured the Board of Directors of defendant company, from his knowledge and examination thereof, he could operate at a profit and repay therefrom the said production notes.

VIII.

That after making said contract said plaintiff J. A. Vance took charge of said mine and funds and proceeded to operate said mining property and mill ores extracted therefrom in said mill with the result that he received proceeds from mint returns of approximately $40,000, all of which returns including monies derived from production notes he expended in the operation of the mine and mill and no net profits were derived from his operation of the mill with which to pay the production notes or any part thereof.

IX.

That plaintiff, J. A. Vance, continued the operation of said mine and mill under said contract until the spring of 1938 when all of the funds belonging to said company including the funds derived from the loans on production notes, the proceeds of mint returns and also considerable sums of money advanced by said plaintiff, J. A. Vance, and other stockholders of defendant company had been ex-

(Defendants' Exhibit T—continued)

hausted and the said plaintiff, J. A. Vance, ceased operations at said property and ordered said mill shut down.

X.

That immediately thereafter plaintiff, J. A. Vance, reported to the Board of Directors of defendant company that it would be necessary to place a mill on said property having a daily capacity of at least 100 tons in order that the same might be operated profitably.

XI.

That plaintiff, J. A. Vance, with a mining engineer by the name of Cole, examined a used mill located in the State of California having a purported capacity of 100 tons per day and recommended its purchase to the Board of defendant company. That he contacted various mining companies in an endeavor to interest them in taking over the development and operation of defendant's properties for an interest therein and after being unsuccessful in his attempt to interest any other companies therein, Lloyd Vance, son of J. A. Vance, acting on behalf of J. A. Vance and Vance Lumber Co., proposed to take over the operation and development of the properties of defendant company under a contract, which is in evidence herein as Exhibit A29 and made a part hereof as though written out in full herein.

(Defendants' Exhibit T—continued)

XII.

At a meeting of the stockholders of defendant company held at the office of the company on August 6, 1938, for the specific purpose among others of authorizing the Board of Directors to take action on the Lloyd Vance proposed contract or any other contract that might be advisable, a resolution was passed by the unaminous vote of more than two-thirds of the outstanding stock, plaintiffs all being present in person or by proxy and voting therefor, which resolution is as follows:

> "Resolved that the Board of Directors of this corporation be and they are hereby authorized, empowered and directed to sell, lease, deal with, operate, exchange or otherwise dispose of, to any person, persons or corporation, desiring to purchase, lease, deal with, exchange, operate same, any part of or all of the assets of this corporation, at such time or times, for such price and upon such terms and conditions, for cash or otherwise, including the exchanging for shares in another corporation, domestic or foreign, as they in their absolute discretion deem expedient, advisable or desirable, and to perform any other acts in this connection which in their judgment they may deem necessary or advisable."

XIII.

That pursuant to said resolution the Board of Directors of defendant company through its officers

(Defendants' Exhibit T—continued)

on September 2, 1938, entered into a contract with one Frank A. Garbutt of Los Angeles, California, to take over the development and operation of defendant's mining property, said contract being in evidence herein as Exhibit A10 and made a part hereof as though set out in full herein.

XIV.

That thereafter, to-wit, on or about December 17, 1938, another and further contract was entered into between defendant corporation, the said Frank A. Garbutt and Log Cabin Mines Company, a corporation organized under the laws of the State of California, and pursuant to the terms of the first contract, Exhibit A10 above referred to, wherein for valuable consideration the said Log Cabin Mines Company undertook to become the operating company in carrying on the development and operation of said mining property, said contract of December 17, 1938, being in evidence herein, marked Exhibit A17 and made a part hereof as though set out in full herein.

XV.

That the said contracts hereinbefore referred to were made by the Board of Directors of defendant company with the purpose and intent that out of the net proceeds of said mining property defendant company would pay all its outstanding indebtedness including the production notes hereinbefore described and that on August 23rd, 1939, in order

(Defendants' Exhibit T—continued)

that there might be no question as to their intention the said Board of Directors of defendant company entered into a supplemental agreement with the said Frank A. Garbutt and Log Cabin Mines Company specifically providing that after the repayment of the amounts advanced by the operating company for labor and machinery and any other expenses as in said contract provided that the net proceeds of said mining property belonging and accruing to defendant should first be paid to the discharge of the said production notes and any other indebtedness of said defendant, which agreement was admitted in evidence as Exhibit A35 and is hereby referred to and made a part hereof as though set out in full herein.

XVI.

That the said Log Cabin Mines Company and the said Frank A. Garbutt have ever since the making of said contracts diligently and faithfully expended labor and money in the development of the said mining property installing thereon a new mill capable of milling in excess of 100 tons of ore per day, together with other proper machinery and equipment so that the total expense of equipping and developing said property by the said Log Cabin Mines Company and Frank A. Garbutt since the making of said contract has exceeded the sum of $100,000.

From the foregoing Findings of Fact, the court makes the following:

(Defendants' Exhibit T—continued)

Conclusions of Law

I.

That defendant corporation has not put it out of its power to pay the production notes out of net production receipts accruing from the sale of ores from its mining property, nor has it jeopardized or interfered with the rights of its creditors.

II.

That plaintiff, J. A. Vance, by his conduct and acts terminated his contract as general manager of defendant company and also abrogated same by his inability to carry out the terms of his contract by placing the mine in profitable production.

III.

That plaintiffs by voting for the resolution under which the Board of Directors of defendant company entered into the contracts referred to in the findings herein estopped themselves from thereafter attempting to repudiate or set aside said contracts.

IV.

That the Board of Directors of defendant company in authorizing the execution of said contracts for the development and operation of its mining properties acted without fraud and in the exercise of their sound discretion.

V.

That the due date of the production notes of plaintiffs herein has not been accelerated by the acts of

(Defendants' Exhibit T—continued)

defendant or its officers and that said notes are not now due and payable.

VI.

That defendant is entitled to a judgment dismissing the action of plaintiffs and to have judgment against plaintiffs for its taxable costs herein.

Done in Open Court this 14th day of February, 1940.

CHAS. W. GREENOUGH
Judge.

Presented by:
E. W. WELLER.

[Endorsed]: Filed Feb. 14, 1940. Frank C. Nash, Clerk.

[Title of Superior Court and Cause.]

JUDGMENT

The above entitled action having come on for trial before the undersigned one of the Judges of the above entitled court, and plaintiffs being personally present and represented by their attorneys, W. H. Abel and O. C. Moore, and the defendant being represented by its officers and by its attorneys, D. B. Heil and E. D. Weller, and the court having heard the evidence adduced by witnesses for plaintiffs and for defendant, and the argument of counsel, and having heretofore made and entered its Findings of Fact and Conclusions of Law, and it

(Defendants' Exhibit T—continued)

appearing that the plaintiffs made and filed herein their bond conditioned for the payment of any judgment for costs that might be awarded against them with United Pacific Insurance Company, a corporation, authorized to execute bonds in the State of Washington, as surety, up to the sum of $200, now therefore, it is

Ordered, Adjudged and Decreed that the above entitled action be and the same is hereby dismissed without prejudice. It is further

Ordered, Adjudged and Decreed that the defendant have and it is hereby granted judgment against plaintiffs, J. A. Vance, Vance Lumber Company, a corporation, W. G. Peebles, and Louise Woodward, and each of them, for its taxable costs and disbursements herein incurred and further for judgment against United Pacific Insurance Company, a corporation, for the amount of such taxable costs and disbursements in no event to exceed the sum of $200 against said corporation.

Done in Open Court this 14th day of February, 1940.

CHAS. W. GREENOUGH
Judge.

Presented by:
E. D. WELLER.

[Endorsed]: Filed Feb. 14, 1940. Frank C. Nash, Clerk.

LLOYD J. VANCE,

called as a witness on behalf of Plaintiffs in rebuttal, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: Will you state your name?

A. Lloyd J. Vance.

Q. By Mr. Abel: Are you the son of J. A. Vance? A. Yes.

Q. And you live at Seattle? A. Yes.

Q. You were a director of Mutual Gold Corporation on June 6, 1939, were you? A. Yes. [511]

Q. All right. What was said on the subject of a quiet title suit by Mr. Garbutt, if anything?

A. There wasn't anything said about a quiet title suit, as I recall. Mr. Grill started reading a written document that was supposed to relate what this meeting was about, apparently had been prepared beforehand, and he read it rather hurriedly; and, as I understood it, in this statement he said that Garbutt was going to bring a quiet title suit and that they were deciding—that the board had decided not to fight it; and a vote was taken and I opposed it, the only dissenting member. [512]

Cross Examination

Q. By Mr. Hinckle: Mr. Vance, did you say that Mr. Russell Collins was there as a director at that time? A. At which meeting?

(Testimony of Lloyd J. Vance.)

Q. The meeting of June 6th, 1939?

A. Why, it seems to me that he was there.

Q. The minutes which are now in evidence show that the directors present were J. E. Stiegler, G. H. Ferbert, W. H. Grill and Lloyd Vance. In view of that do you wish to amend your statement?

A. Well, I don't recollect.

The Court: Doesn't the record speak for itself on that?

Mr. Abel: Yes; and we do not deny the record on the subject.

Q. By Mr. Hinckle: Upon the question of your understanding of the resolution, the resolution, according to the minutes, was:

> "It was moved and seconded that inasmuch as Mutual Gold Corporation has no interest in the mining claims in California at this time that the company makes no defense to the action of Mr. Garbutt brought to quiet title to said claims in the Log Cabin Mines Company."

Did you hear that word "brought" or did you notice that when it was read?

A. No; I didn't. It was read very hurriedly.

[515]

JOSEPH A. VANCE,

called as a witness on behalf of plaintiffs in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Abel: Mr. Vance, did you hear the testimony of Russell Collins in substance and effect that you told him in October, 1938, at the mine or Leevining or in that vicinity, "to hell with the small stockholders of Mutual Gold Corporation"?

A. I never said such a thing.

Q. No. Did you hear his statement?

A. Oh, yes.

Q. Did you at that time, place or occasion, or at any other time, place or occasion, make such statement or statement of similar import? A. No.

Mr. Abel: That will be all.

The Court: I would like to ask Mr. Vance some questions if I may.

Mr. Abel: Yes.

Q. By the Court: Mr. Vance, in looking over the exhibits during the night I find here a number of exhibits, starting in with Exhibit B, a letter to the stockholders of Mutual Gold. Who prepared that letter for you?

A. Well, I prepared it with the approval of Mr. Abel. [518]

Q. Mr. Abel has been your attorney throughout all these disputes in the Mutual Gold, has he not?

(Testimony of Joseph A. Vance.)

A. Oh, he has been our attorney for 25 years I guess.

Q. And you at all times consulted him concerning these problems?

A. Well, most of the time.

The Court: Now, this letter, did Mr. Abel—maybe you can answer that, Mr. Abel.

Mr. Abel: Yes, your Honor; I think I can, your Honor. I would like to state that my first acquaintance with this matter dated from August 13, 1938, and that I attended the directors' meeting on that date when the DeMille proposal came in.

The Court: And did you help prepare or approve the various letters that Mr. Vance sent out to stockholders and the production note holders?

Mr. Abel: Yes, your Honor; that Mr. Vance sent out. I had nothing to do with nor did I know of until after their issuance the Bateham notice that was sent out.

The Court: I note in these exhibits—I don't remember just which one, B, C or D, along in there—a recognition, at least knowledge, of the Garbutt contract and the provision for the forming of a new corporation.

Mr. Abel: Yes, your Honor.

The Court: So that the minority stockholders were not ignorant of that situation? [519]

Mr. Abel: That depends upon the date, your Honor.

(Testimony of Joseph A. Vance.)

The Court: Well, let us see if I can find one here.

Mr. Abel: I was not at the August 6th meeting.

The Court: Did you prepare or have anything to do with the letter of September 13th, signed by Mr. Woodworth and a number of stockholders?

Mr. Abel: No, your Honor; I did not have anything to do with preparing that.

The Court: May I call your attention to this and ask you whether or not—and I am asking you because you were representing the minority group and the claim has been here, at least the facts have been brought out, that the majority group, as we will call them for the sake of convenience, Garbutt and the majority of the board of directors, had in their various communications kept in the dark various matters of the Log Cabin.

Mr. Abel: Yes, your Honor. We found it out in a very fragmentary way.

The Court: For instance, this part here:

(Defendants' Exhibit G.)

> "We, as the stockholders of the Mutual Gold, therefore, after being fully advised in regard to said contract, as well as the Lloyd J. Vance proposed contract, believe it our duty to advise you that the Garbutt contract contemplates the immediate transfer of all of the assets which the Mutual Gold now owns [520] in exchange for stock in a new corporation to be formed by Garbutt; that the said contract is, in our

(Testimony of Joseph A. Vance.)

opinion, woefully lacking in covenants binding the Garbutt Corporation. To part with all of our holdings, as contemplated by the Garbutt contract, without binding such corporation to more definite performance is dangerous and might result very disastrously to the stockholders of the Mutual Gold. We are, therefore, definitely opposed to the Garbutt contract and believe that it should be rejected."

Now, there is a letter signed by numerous stockholders.

Mr. Abel: What is the date of the letter, your Honor?

The Court: September 13, 1938.

Mr. Abel: September 13, 1938.

The Court: And I was wondering if you had any knowledge of the contents of that letter?

Mr. Abel: Yes, your Honor, but I did not learn, —I did not see or learn of the contents of the contract until after it was executed.

The Court: Well, of course, this is after the date of the execution of the contract.

Mr. Abel: Yes.

The Court: And here is another letter dated September 20, 1938, marked Defendants' Exhibit E, to the stockholders, signed by Dunn, Peebles, and others. Did you prepare that [521] letter?

Mr. Abel: No, your Honor. I did not represent the—I think I know who did prepare it, but I think

(Testimony of Joseph A. Vance.)

I knew what was in the letter, anyway. And I mean by that at the time.

The Court: And the letter of January 30, 1939, marked Defendants' Exhibit F, signed by "A. P. Bateham." Did you prepare that letter?

Mr. Abel: No, your Honor. I had nothing to do with that.

The Court: But you were aware of the contents at or about the time it was sent out?

Mr. Abel: That was dated January 30th, was it?

The Court: Yes.

Mr. Abel: I did not learn of that until February 3rd or 4th after it was issued. I learned of it at Spokane either the evening of the 3rd or the morning of the 4th of February, which I think was the date of the meting.

The Court: Here is a letter that is undated, but has a pencil notation on it "Sent about 9/12/38", Defendants' Exhibit B, signed by "J. A. Vance", a rather lengthy letter. Did you prepare that letter?

Mr. Abel: No; I did not prepare that letter, your Honor. I was furnished with a copy within a day or so of the date it was sent out.

The Court: That is all.

Mr. Hinckle: I have no cross examination. [522]

The Court: That is all, Mr. Vance.

Mr. Abel: Your Honor, I think under the circumstances I am almost required to take the stand. I do not like attorneys taking the stand, myself. [523]

W. H. ABEL,

a witness on behalf of plaintiffs in rebuttal, being first duly sworn, testified as follows:

The Witness: I desire to slightly correct my statement of a little while ago. I represented some of the production note holders, not all of them. I represented Mrs. Woodward, Mrs. Woodworth, W. G. Peebles, J. A. Vance and the Vance Lumber Company.

My representation of the minority stockholders, if they may be called such, arose and existed only to a limited extent. The stockholders' meeting was called to be held on September 24th at Spokane to pass upon, ratify, or reject the Garbutt contract of September.

The Court: Which agreement was cancelled.

A. Yes; that was cancelled. There had been an active canvassing of stockholders and a letter to which the Court has called our attention, I think of September 12th, had gone out to the stockholders and the campaign was so vigorous that the meeting was called off. We appeared at the office of Dr. Collins, the brother of Russell Collins, which was the company office of Mutual Gold Corporation, on the morning of the 24th of September. Mr. Collins was present—I mean Dr. Collins was present, and Mr. Weller, the attorney for the company, Mrs. Fuson also was present. There were a number of us there, maybe 15 or 20 stockholders. O. C. Moore was present and Mr. Woodworth was present. And we [524]

(Testimony of W. H. Abel.)

requested an opportunity to see the proxies that had been sent in for the meeting and Mrs. Fuson, on advice of Mr. Weller, declined to permit us to see the proxies.

Those present adjourned to the office of Mr. Bateham and organized the Stockholders' Protective Committee contemplated. I was not retained by that committee. My name was, however, signed to the complaint in the quiet title suit later brought by Bateham in Spokane County. I did not prepare the pleadings in that case and did not participate nor was I present, but, as I stated, my name did appear upon the complaint, but there was no relation other than as stated and no contract of employment or retainer.

Q. By the Court: At none of these meetings, if I remember correctly, directors' meetings that you attended, was Mr. Garbutt present?

A. Not any. I think I would like to say, your Honor, I have a clear memory of the meetings which I did attend. The first meeting that I attended was August 13th, at which the DeMille proposal came before the board. The persons who submitted it were Russell Collins and G. H. Ferbert. That was the first time I had ever met Ferbert, Stiegler, Cole, who was present, the engineer, Mr. Hickcox, I think was present. I had met him once before, some years before.

Q. Did you prepare the Vance Proposal?

(Testimony of W. H. Abel.)

A. Yes; I prepared that, your Honor, but I prepared [525] that as attorney for——

Q. Mr. Vance? A. ——for Lloyd Vance. [526]

PLAINTIFFS' EXHIBIT 98

Seattle, Washington
August 12th, 1938

Board of Directors,
Mutual Gold Corporation,
401 Fernwell Building,
Spokane, Washington.

Gentlemen:

I herewith submit the following proposition with respect to your holdings and property situate in Mono County, California.

I will, forthwith upon your acceptance of this offer and my proposition as herein contained, organize a corporation under the laws of the State of Washington having a capital stock of $162,500.00, divided into 650,000 shares of common stock of the par value of 25 cents each. Such corporation shall be known as the Mono Lake Company, or by such other name as I may decide upon. Articles of Incorporation shall provide that the amount of paid in capital with which the cor-

(Testimony of W. H. Abel.)

poration will begin business shall be $70,000.00. Such corporation so formed by me is to take over all of the mining property and equipment of your Corporation and to operate the same under the proposed terms and agreements as set forth in the memorandum of Agreement hereto attached and made a part hereof, and your acceptance of this offer will be an agreement by you to execute such agreement forthwith upon the completion of the organization of such corporation, subject, of course, to such changes as may be mutually agreed upon prior to the execution thereof.

In further explanation of the Agreement hereto attached, I have made arrangements with Mr. R. J. Cole, Mining Engineer, who recently made an examination of the property for your Company, and whose report you have, to act as superintendent in complete charge of operations, and Mr. Cole has agreed with me to so act for the new corporation for a period of at least one year, and it is my intention to use my best efforts to have Mr. Cole continue in such capacity as long as his services may be secured and be satisfactory to you and the Operating Company.

It is understood, however, that no personal liability of any kind, character or description shall rest upon me other than as to the forming of such corporation as herein contemplated, and that any and all liability with respect to carrying out the terms of the said contract, after the organization of

(Testimony of W. H. Abel.)

said corporation and the execution of the said contract shall be upon the corporation so formed, and not upon me.

Respectfully submitted,

LLOYD J. VANCE
c/o Vance Lumber Company,
Joseph Vance Building,
Seattle, Washington.

Q. Mr. Abel, before the recess you testified that the knowledge of contracts came to you as attorney for certain minority stockholders in a fragmentary way. I wish you would please explain that statement.

A. We found them out always at later dates, with very much difficulty in finding them out. I went to the expense even of retaining a lawyer at Bridgeport in Mono County to watch the records to see if anything went on file. The original De Mille proposal was copied and we were supplied with a copy as of the 14th of August. The subscribed contract was not made available to us until the morning—I may be mistaken as to one morning—on either the 22nd or the 23rd of August—no; of September, just before the [530] meeting of stockholders to ratify was to be on the 24th of September; and it was either one day or two days before that we saw that contract for the first time.

(Testimony of W. H. Abel.)

The contract of October 31st—I was wholly unaware, and I was trying to watch—I was wholly unaware of the contract of September 22nd. The deed to Mr. Garbutt of September 21st was not filed of record until November. We learned that he had a deed and opportunity to see that deed was denied us on the 27th of September. On that date Mr. Garbutt told us he would not take any position as to whether he claimed as owner or otherwise, and we could not see the instrument; and we did not see the instrument until after it was filed.

The contract of October 31st was not known to me, anyway, until I took Mr. Garbutt's deposition the following August. The contract of November 1st did not come to my attention at least until the following August.

The contract of December 17th was the first intimation—and I was on the lookout to get information—was not until either the—it was some time after the 10th of January that Mr. Grill supplied us with a copy.

The quiet title suit in California, the first intimation of any kind that I had of it was when the answer in this case came in. [531]

Cross Examination

Q. By Mr. Hinckle: When did you first come to Los Angeles to confer with Mr. Garbutt and others?

(Testimony of W. H. Abel.)

A. On the morning of September 26th, 1938. We left—I would like to say that we left Spokane, we drove from Spokane to Portland in order to catch the train to be present upon the 26th.

Q. At that time you knew all about the contents of the Garbutt contract, did you not?

A. I had a copy of the Garbutt contract which I had received a day or so before, that is, a day or so before the Spokane meeting, the stockholders' meeting which was to have been held on September 24th.

Q. What did you say was the first directors' meeting you attended? A. August 13.

Q. Mr. Vance was a director of the board of the Mutual all that time, wasn't he?

A. Until he resigned, which was, I think, on September 19th. [532]

Q. By the Court: Did you prepare this letter that is marked Plaintiff's Exhibit 98, in which the proposal was modified, in which Mr. Cole is to be—

A. Oh, no. I did not prepare that, your Honor.

Q. You had knowledge of its contents?

A. Oh, yes. It was discussed at the August 13th meeting to overcome the objections to J. A. Vance. [533]

J. R. STURGEON,

called as a witness on behalf of plaintiffs in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination [534]

Q. But did you remain at the mine and mill after the mill quit running in '38 under Vance?

A. Yes, sir.

Q. What was the condition of the mine as to cave-ins at that time?

A. Well, the only cave-in that was there at that time was on the 125 level.

Q. What were the dimensions of the cave-in?

A. Well, the main working drift was closed for about 50 feet.

Q. And as to whether or not that was the condition when the mining operations were resumed under Mr. Garbutt? A. It was. [535]

A. Well, the expense of timbering and removing the cave, the labor of that.

Q. Well, what would be the cost of it?

A. Oh, I would say at that time it could be removed for $10 a foot.

The Court: How much?

A. $10.

Q. By Mr. Abel: And there were 50 feet?

A. I think it could have been cleaned out for $500 at that time. I couldn't say what the cave was after.

(Testimony of J. R. Sturgeon.)

Q. By the Court: You heard Mr. Garbutt's general description of this mine as to being broken up. Is that true? A. Yes, sir.

Q. And the tendency to cave in?

A. Yes, sir.

Q. Has that been one of the problems up there?

A. It has. The ground is very broken up. [536]

J. R. Sturgeon Recalled

Further Direct Examination

Q. By Mr. Abel: As to whether this mine is an exception, or is it like many mines, in respect to the problem of cave-ins?

A. Well, I would say that there is several mines that I worked in with that condition, broken up country.

Q. Were there any cave-ins while you were working for Garbutt there?

A. No, sir.

Q. There were none?

A. Not while I was there.

Q. By the Court: Did all the tunnel work have to be timbered?

A. Practically all of it; yes, sir.

Q. By Mr. Abel: And lagging?

A. Yes, sir.

Q. Installed, too? A. And spiling. [537]

M. F. HALEY,

recalled as a witness on behalf of plaintiffs in rebuttal, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. By Mr. Abel: What is Exhibit for Identification 97? A. 97?

Q. Exhibit 97. That is the number of the exhibit. What is the paper?

A. That is a receipt that I was requested to sign with their bookkeeper that had been put in as chief accountantist at the mine, a receipt for my wages.

Q. Who was "E. S. S."?

A. This is Mr. Sherwood.

Q. He was the bookkeeper at the mine?

A. Yes, sir.

Q. When did you get that paper?

A. I got it on that date.

Q. What date?

A. It was fourth month, 15th day, '39.

Q. April 15, 1939? A. Yes, sir.

Q. It bears the signature of "Mutual Gold Corporation, employer." You stated that up to that time your statement of wages and deductions were always under that signature?

A. Yes, sir; they were. [539]

Q. "Mutual Gold Corporation, Employer"?

A. As far as I can remember back.

(Testimony of M. F. Haley.)

Mr. Abel: I offer the exhibit in evidence, identification 97.

The Clerk: Exhibit 97. [540]

Q. With respect to the cave-in on the 125-foot level what were the dimensions of the cave-in at the time you quit working under the Vance management, I think you said in May, 1938?

A. 1939.

Q. 1938.

A. Oh, for Vance; yes. Well, the extent, there was a caved place there right close to the mill, I should say about 60 feet from where the place was graded for the concentrating tables, and that was—

Q. The precise location is not important, but its size and dimensions is the thing.

A. The diameter of that at that time, even up until the time that I left there, for that matter, was about, I would say, about 40 feet, maybe 50 feet in diameter, and possibly 20 to 30 feet down to where it had settled.

Q. The surface of the earth had just settled down? A. Yes; settled down.

Q. Sort of a sump hole, as it were?

A. Yes, sir. [541]

Los Angeles, California,
Friday, March 21, 1941, 2:00 P. M.

Mr. Abel: May it please the court, I owe it to the court and to myself to correct an error as to dates in my testimony, if I may do that at this time.

The Court: Certainly.

Mr. Abel: The Garbutt contract came to my attention more than two days earlier than the contemplated meeting of stockholders on September 24th. I find that it came to my attention on the 9th day of September and was followed by the undated J. A. Vance letter which was sent out on or about the 12th day of September. [549]

CROSS-COMPLAINANT'S EXHIBIT U

Frank A. Garbutt
Suite 712 411 West Seventh Street
Los Angeles, California

July 8, 1940.

Directors,
Mutual Gold Corporation,
Mr. J. E. Stiegler, President.

Gentlemen:

I made you a detailed report on January 8th, 1939 and another upon January 8th, 1940.

You have also been kept in daily touch with the conditions at the mine by copies of many of the

(Cross-Complainant's Exhibit U continued)

routine letters which not only give details of operations but also have a more or less personal touch that serves to acquaint you with what I am trying to accomplish in building an organization for your protection, and some of the difficulties of accomplishing it.

It is the popular impression of the non-professional investor that all you have to do to operate a mine successfully is to employ a manager or, perhaps, only an engineer and turn the business as well as the technical details over to him and your troubles will be over.

The average so-called mining engineer, even though he possesses a proper technical education, is usually a notoriously poor business man; competent mine managers are about as scarce as hens' teeth and, strange as it may seem, the boards of directors of mining companies usually do not have much knowledge of mining although they may be good business men.

This is not vital if they are successful (which is not usually the case) in securing competent technical guidance and efficient local operative management.

No enterprise is safe that depends upon the ability, continuity, honesty and the knowledge of one man and not the smallest part of my task is to endeavor to build an organization that will function properly, come what may, and become independent of individual vagaries and the uncertainties both of life and permanency of employment.

(Cross-Complainant's Exhibit U continued)

As a foundation for this the Mutual Gold Corporation is particularly fortunate in having a Board of Directors, the majority of whom have had considerable experience in mining matters as well as in business, legal and administrative affairs and who have demonstrated an unselfish devotion to the stockholders' interest entirely devoid of any selfish personal motives.

It becomes readily apparent to their associates when directors, influenced by greed or hope of personal gain, grab for some advantage and put their own interests above those of the stockholders.

The experience of your Board of Directors is invaluable to you and the Company. Because of their acquaintance with the early affairs of your Company it could not be replaced and this familiarity has been added to as rapidly as possible by close contact and co-operation with this office. In this way you also become of increasing importance to me and to the "Log Cabin," the success of which depends upon our combined effort and judgment at this time and in the future.

It may very well transpire that your knowledge of the affairs of the Company may be the best protection that my estate will have in the future so that I am not entirely unselfish in desiring that you know all that there is to be known about the business and welcome any advice you want to give and reply to any questions that you may desire to have answered, and this is one of my reasons for this rather lengthy preamble.

(Cross-Complainant's Exhibit U continued)

It is as essential that you should be acquainted with, and be qualified to pass upon our organization at the mine as it is that you should be familiar with the business affairs of the Company.

You may have wondered at the patience I have shown in the past and my apparent procrastination in dealing with some of our personnel problems as well as my impatience in others. In explanation, let me state, that our staff at the mine, like your Board of Directors, improves with age and experience.

Men such as we might like to employ for our various jobs do not exist at any price that we could afford to pay and I believe that the men we have should be, by previous experience with us, better qualified than any new comers that might be available. They have demonstrated an ability and a loyalty that is remarkable under all of the discouragements that I and conditions have subjected them to and it has cost some money to acquaint them with our affairs. Even if the best men in the world came in to take their places, they would have to learn all that our men now know and some of that can not be learned except as the work was in progress and by going through what we have gone through.

To put it another way, we must create men for our jobs. It is not practical to find them already made. Our organization is apparently gaining strength and its strength will be our strength, especially in a long, hard pull.

(Cross-Complainant's Exhibit U continued)

Now to our physical affairs in which you are more directly interested. Briefly stated, our matters have not progressed entirely to our liking, mainly because the grade of our ore has averaged less than we had reason to expect and because, also, the quantity of ore that it would pay to mine and mill had been heretofore rather optimistically guessed at rather than scientifically estimated. However, notwithstanding these facts, we have made some progress.

We have finally made the payments of ten thousand dollars due to the owners November 1st, 1939, borrowing $5000 from the bank to aid in so doing.

Out assessment work was all done and proper notices thereof prepared by our attorney and filed at Bridgeport.

We have taken no steps to patent additional ground mainly because of lack of funds but partly from lack of time to give it the personal attention necessary to save expense.

We have put our water rights and water supply into the best possible shape and are doing the same with the water system itself. This work should be practically completed and tested well before the coming winter. We will have ample water for our present capacity of 110 tons of ore daily and expect to have enough water for 150 tons and by recovering some of the water can, in all likelihood, provide enough for 250 tons daily.

The County has accepted the road from the Ranger Station to our property as a County road and

(Cross-Complainant's Exhibit U continued)

is saving us considerable expense by keeping it in repair. This is quite an advantage as we have not been able to proceed with the building of our new road on account of lack of funds. We have expended about $125.00 on surveys on this road and are getting bids on its construction preparatory to building it when able.

We installed a two and a half inch tailings line of extra heavy pipe in place of the two inch line as necessitated by the increased capacity of our new mill. This increase of tonnage pumped decreased the cost per ton of our tailings pumping very materially. The two inch pipe in the original line (which was as large as that tonnage permitted) was salvaged and used in other lines at its full value.

Last winter, due to the freezing of our tailings water at the tailings pond, the accumulation of ice was such that a small portion of our slimes escaped and, during the spring melt, found its way via Sadie Williams Creek to Leevining Creek instead of via Andy Thompson Creek to Tioga Lodge as formerly during the Vance regime. This, however, did no material damage although it required some quick thinking and quick work by the mine staff and our friends in Leevining to install about a thousand feet of six inch line at our expense to do away with the contamination of the water supply of Leevining. The Fish and Game authorities also registered objections but, being satisfied that we

(Cross-Complainant's Exhibit U continued)

were doing everything possible, they made us no trouble.

We can consider ourselves fortunate that we had no cyanide to contend with and it is hoped that any recurrence can be prevented, although with drinking water on both sides of us, this will always be a problem for even if we pipe our tailings or waste water to the Lake there will always be the possibility of a break in the line.

I am happy to say that as yet there has been no considerable movement of your "hillside tailings" as Mr. Collins feared, and as far as I know, no material damage has ensued. While protecting myself against this eventuality I did not share his apprehension.

This year we experienced an unforeseen condition that did considerable damage by causing surface water to seep into the ground to our lower levels resulting in serious caves. According to John Simpson, our Superintendent, this was caused by the fact that during our past warm winter the surface of the ground at this point was not frozen as it usually is when the spring run-off occurs. While Mr. Simpson minimizes this loss and thinks that it could not have been prevented, and that we can recover all of the ore temporarily lost, I am inclined to not agree with him. I estimate the loss as at least $15,000 and believe it is much more but think that the condition can be ameliorated in the future. This is being investigated and such steps

(Cross-Complainant's Exhibit U continued)

as seem appropriate will be taken to more rapidly drain the surface in the future.

We were not able to use the old stamp mill for any useful purpose, and as it was in the way, it is being dismantled and offered for sale. I have advertised it and shown it but so far we have not been able to obtain any offers. These efforts to sell were commenced last year while it could still be seen in operation but we have not been able to obtain an offer although we would gladly sell it for a thousand dollars: I recently had it examined by the dealer from whom Mr. Vance bought it, together with some of the other old machinery, and have him looking for a buyer but he informs me that there is very little likelihood of our being able to make a sale of a mill of this kind as there is no demand for it.

Incidentally, he stated that our present equipment was modern and fine and expressed his surprise at its compactness and capacity. He also wrote: ". . . Want to say in closing that the operation and class of mill installed at the mine could not be more efficient, it is fine."

Russell Collins is still in the Company's employ. He is, as you might say, the watch dog of the stockholders. We recently gave him leave of absence to attend to some of his business in the North during which time, we are informed, he was sued by Vance for $10,000, for damages charging malicious publication with intent to (quoting from Vance's Complaint)—

(Cross-Complainant's Exhibit U continued)

". . . provoke plaintiff to wrath, expose him to public hatred, contempt, obloquy and ridicule, deprive him of the benefit of public confidence and social intercourse, injure his character, blacken his reputation, impute fraud and dishonesty, and reflect shame upon him, injure and destroy his business as stockholder and creditor of Mutual Gold Corporation, deprive him of the confidence of the stockholders, officers and board of directors of Mutual Gold Corporation."

However this may be, Russell countered by suing Vance for an accounting, alleging a partnership in the promotion of the Mutual, and some of my attorneys, who have examined the pleadings, tell me that they would rather have Russell's suit than Vance's. At any rate we will probably learn just how Vance got 75,000 shares of the Mutual promotion stock and also whether he paid for the rest of his stock the same price that other stockholders paid.

We have added to the equipment at the mine as sparingly as was possible with economical operations. Among the equipment bought were three hoists, one tugger and two slushers, used in moving ore in the mine and from the dump. They have saved their cost already.

As to the "Stockholders" suit filed in the Federal Court in Los Angeles by Abel, Moore & Anderson, January 10, 1940, purporting to represent Helen

(Cross-Complainant's Exhibit U continued)

M. Sutherland, 333 shares, and Charles W. Sutherland, 333 shares, M. I. Higgens, 333-1/3 shares, and Maybelle Higgens, 333-1/3 shares, and Helen Maude Lorenz, 500 shares as Plaintiffs. Investigation showed that these plaintiffs who are very small stockholders, owning 1833-2/3 shares out of 2,641,182 shares issued (about 1/14 of one per cent) knew very little about it and apparently wished they knew still less.

The defendants, other than the Chandis Securities Company, have alleged in their answer that Vance was behind this suit, was paying the expenses, and had induced the plaintiffs to bring the action. The plaintiffs moved the Court to strike out this allegation, but the Court refused to do so. Fortunately, a plaintiff in such an action could not withdraw if he wanted to. This suit also named the owners as defendants and it has not helped our standing with them.

Vance, as you already know, is "not doing so well" with this suit. They hired an attorney here and have gone to some expense. I am told Vance made the statement that he would spend $50,000 to win this lawsuit. He must think that lawsuits can be won by money. In my opinion, if he spent $500,000 he couldn't win this one. However, you never can tell about a law suit. Nevertheless, we will not let him dismiss this action. We want to see it tried and see where it will lead. Also, he has made charges of fraud that have no foundation in fact and we will insist that this issue be tried. It seems to me

(Cross-Complainant's Exhibit U continued)

that there is no justification whatever for the bringing of this suit and all of our attorneys share this opinion as also do a large majority of your Directors and stockholders.

Divesting it of technicalities the Complaint alleges a conspiracy between your Board of Directors and me to rob you and your stockholders of your property. As the majority of your Board are amongst the largest stockholders, you are accused of a conspiracy to rob yourselves.

The plaintiffs ask that the contract with me be cancelled and demand an accounting for gold which I have "wrongfully extracted," the amount of which is unknown!! The facts are, that I have accounted to you for every remittance received on the day that it came into my hands, giving you a duplicate copy of the Mint returns.

Our attorneys are hopeful that the trial of this suit together with other proceedings which we have in mind will establish just exactly what happened in the past that led up to the so-called offer of Lloyd Vance, who was admittedly acting as dummy for his father, Joe Vance, at a time when Joe Vance was a Director and Manager of the Mutual and occupied a fiduciary relationship to it and therefore debarred from acting for himself.

We expect to fix the responsibility for this suit and for the acts that went before it. We also think that unless the plaintiffs can establish a reasonable basis for bringing this suit and for the allegations

(Cross-Complainant's Exhibit U continued)

that they swore to in their Complaint that they are not entirely devoid of liability in the matter for any loss they occasioned the Mutual Gold thereby, including both costs and also any damages caused by preventing its financing especially should it develop that this was a part of a conspiracy for the promotion of some ulterior purpose.

The net result of the suit so far has been to prevent me from getting someone to take my place and finance you further and to force me to remain in the mining business against my inclination and to prevent the financing of a cyanide plant and such other improvements and development as might seem desirable.

Vance is materially jeopardizing any further financing. All of this I am convinced is not with the idea of doing the Mutual or its stockholders any good but solely for the purpose of putting it to expense for the personal purposes of Vance.

In reporting the milling results I am including the returns from the starting of the New Mill November 3rd, 1939, part of which is in my report to you of January 8th, 1940, and bringing that down to date so as to make it more readily understood.

(Cross-Complainant's Exhibit U continued)

	Tons	Per Ton	Returns
led from Nov. 3 to Dec. 6, 1939	2253	$3.84	$ 8,653.84
" " Dec. 7 to Dec. 21, 1939	1467	3.13	4,590.10
" " Dec. 21, 1939 to Jan. 4, 1940	1091	5.06	5,519.88
" " Jan. 4 to Jan. 14, 1940	938	5.68	5,333.51
" " Jan. 14 to Jan. 24, 1940	1073	7.10	7,625.24
" " Jan. 25 to Feb. 6, 1940	1155	6.01	6,945.01
" " Feb. 6 to Feb. 16, 1940	1066	6.71	7,158.98
" " Feb. 16 to Feb. 26, 1940	1001	7.36	7,371.01
" " Feb. 26 to Mar. 7, 1940	1092	4.75	5,194.45
" " Mar. 7 to Mar. 17, 1940	1096	5.61	6,154.75
" " Mar. 17 to Mar. 28, 1940	1157	6.18	7,153.54
" " Mar. 28 to April 8, 1940	1209	5.29	6,396.96
" " April 8 to April 18, 1940	1096	5.71	6,256.56
" " April 18 to April 28, 1940	1061	5.96	6,324.64
" " April 28 to May 8, 1940	1160	5.29	6,141.30
turns from Liner Clean-up	.....	.....	5,496.95
lled from May 8 to May 18, 1940	1090	4.41	4,813.60
" " May 18 to May 27, 1940	866	5.05	4,377.45
" " May 27 to June 6, 1940	1002	4.95	4,967.94
" " June 6 to June 16, 1940	992	5.01	4,969.96
" " June 16 to July 3, 1940	1642	5.19	8,530.60
	23907		$129,976.27

During this period of 8 months from November 3, 1939 to July 3, 1940, we milled 23,907 tons or 2738 tons per month of an average milling value of $5.43 per ton. This was at the approximate rate of 91.3 tons per elapsed day, however, allowing for idle time, we actually milled about 100 tons per working day. The mill would have no trouble in handling one hundred and fifty tons per day, and in my opinion, with nominal additions it would handle 250 tons daily if the mine was able to furnish it. We have recently stepped up the tonnage milled to

(Cross-Complainant's Exhibit U continued)

approximately 110 tons daily with the idea of making good 100 tons daily which we will endeavor to do as long as the mine can supply it. We do not anticipate much difficulty in doing this if the grade of the ore does not decrease too much.

A considerable amount of our lost time was due to the power being shut off on account of thunder storms, etc. It was shut off because of a brush fire recently. On the whole, however, the power service has been very satisfactory.

It is fortunate for us that we have been able to materially reduce our operating costs. We are spending a little money now in the endeavor to still further reduce them and it is my hope to get these costs down to $4.00 per ton or lower exclusive of depreciation but including upkeep and repairs. This would include all operating overhead but allows nothing for manager's salary as I am working for nothing.

I visited the mine in company with Director William L. Grill in the latter part of June, spending two weeks' time in planning little betterments and going over the entire situation in detail. While there I made some changes in management designed to give better results. On the whole I think our staff has done very well under all existing conditions.

We went into last winter without being as fully equipped as we would have liked, being short of bunkhouse and storeroom space, etc., but the boys made the best of it with a very fine spirit.

(Cross-Complainant's Exhibit U continued)

You will recall that when it was deemed advisable to discontinue work on No. 4 South last year on account of water complications that we had just encountered some ore of which we had high hopes that apparently ran about $25.00. However, on resuming work this year, this development work was a distinct disappointment to us.

The following is a list of the assays taken from Car Samples of this new work which, at this writing, approximates 139 feet of drifting on the vein to the South:

$11.90, $19.60, $7.00, $7.00, $1.40, $5.25, $7.00, $6.30, $6.30, $2.80, $7.00, $10.50, $2.80, $8.75, $3.50, $1.40, $6.30, $4.90, $3.50, $1.40, $8.05, $1.40, $4.20, $3.50, $9.10, $2.80, $4.20, $7.70, $6.30, $3.50, $4.90, $4.20, $5.95, $3.85, $4.20, $9.45, $0.70, $2.10, $1.05, $0.70, $0.70, $2.10, $1.75, $1.40, $1.05, $3.50, $1.40, $4.20, $6.30, $3.85, $15.25, $2.45, $5.25, $1.75, $1.05, $0.70, $1.05, $5.60, $3.15, $1.40, $8.75, $7.70, $2.80, $2.80, $1.05, $1.05, $2.80.

The average assay value is $4.52. The vein has diminished in width to two feet but it is well defined and we should follow it South as long as it is readily traceable. This is good prospecting.

We have had bad ground and plenty of water which latter Russell Collins regards as indicative of good ore. In this case it did not prove so. Lately the water has been decreasing in the face as though we were getting through it and the ground is breaking better. We have also located a winze on the

(Cross-Complainant's Exhibit U continued)

No. 4 level at a point where we had good ore and where it seemed likely that we would encounter the least amount of water.

We have cut a station at this point and at the time of writing this report the collar sets are being put in and sinking will be commenced immediately.

We are sinking on the vein and hope to be able to get down fifty feet or more with a tugger. We also hope that the winze will be dry for a little way at least but have an electric pump doped out to handle the water should the showing of ore and values warrant it. This is the best possible prospecting and will tell us more about the mine than any other work that could be done with our present knowledge.

On No. 2 North level we drove quite a distance beyond any probable pay ore and as the formation is broken up and faulted we discontinued further prospecting in that direction on No. 2 North. We expect, however, to drive into the vein to the North on No. 4 where we expect to find a couple of hundred feet of mill ore, which we need. If we do not encounter it we will at least get some information as to the rake of our ore bodies.

I expect to send a large Caterpillar to the mine in a few days to extend and perfect our tailings ponds in view of our last winter's experience at which time we expect to do some further surface stripping and prospecting. Last year we did some that was very informative if not successful.

(Cross-Complainant's Exhibit U continued)

At little expense we uncovered a formation 30 to 40 feet wide, most of which showed some values, perhaps a dollar a ton. We got one assay of about $8.00 but could not locate any amount of such ore.

I examined these locations very carefully on my last visit to the mine and consider this as the cheapest prospecting that can be done. By going through the overburden with a Cat and Bulldozer we expose the formation very cheaply and a strike even of low grade ore by this means might very materially change our entire picture.

I think a substantial profit could be made on $4.00 ore in such large bodies as this formation indicates might be possible. However, all of this is in the nature of speculation that might properly be termed wishful thinking.

All of our operations have been carried on with the utmost economy that did not involve the losing of money. We have accumulated a small working capital, not sufficient, however, to repay me any of the money advanced by me and not sufficient to permit the doing of prospecting work that I would very much like to do. I wish I had available the money that has been absolutely wasted in the past. It could be expended at this time in much needed exploration work.

However, I can see no justification in our running you further into debt at this time and neither would it be possible to finance you further upon proper and advantageous terms while the present litigation

(Cross-Complainant's Exhibit U continued)

is pending. Therefore, I have made every effort to conserve our resources and reduce the per ton cost of our operations in which we have been fairly successful and hope to be more so.

Recently the new Assessor of Mono County raised our assessed taxes from $10,500 to $75,000. Notice came to us on the last day it was possible to appear before the Board of Equalization at Bridgeport.

Our attorney, Mr. Hinckle, left here at three A. M. on that date, made his argument before the Board on time, obtained a reduction to $65,000, laid the foundation for a further reduction in the future and got back to Los Angeles at 9:00 P. M. the same night, charging us for this service only his gasoline bill for this 800-mile drive. However, I expect to benefit more than the amount of this tax on the road work which the County is doing on our road.

I hope before the year is out to be able to report to you that some of our prospecting has shown ore bodies heretofore unknown. In the opinion of our Superintendent, Mr. John Simpson, and as far as I am able to determine, we have mined our ore just as it came. That is the only way that it is practical to operate such a property as it is necessary to mine the lower grade and run of mine ore in order to find the richer portions which are irregularly distributed in the vein matter. It is not practical to practice selective mining nor to sort our ore in the mine.

(Cross-Complainant's Exhibit U continued)

As you receive operating statements every month you are familiar with our receipts and disbursements.

I can assure you that we are leaving no stone unturned to protect your interests in every way in our power and would be glad of any suggestions you may desire to make.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

CROSS-COMPLAINANT'S EXHIBIT V

FRANK A. GARBUTT

Suite 712—411 West Seventh Street
Los Angeles, California

February 15, 1941.

Mr. Richard G. Adams,
Los Angeles Times,
Los Angeles.

Dear Mr. Adams:

In accordance with your telephone request I enclose herewith a statement of the ore milled by the Log Cabin Mines Company from July 3rd to December 31, 1940, inclusive.

		Tons	Per Ton	Returns
Milled from	July 3, 1940 to July 14, 1940...	1233	4.74	$ 5,845.73
" "	July 14, 1940 to July 24, 1940	1169	4.31	5,047.53
" "	July 24, 1940 to Aug. 4, 1940...	1224	4.27	5,237.23
" "	Aug. 4, 1940 to Aug. 16, 1940...	1332	4.81	6,407.36
" "	Aug. 17, 1940 to Aug. 29, 1940	1319	3.10	4,090.88
" "	Aug. 29, 1940 to Sep. 12, 1940	1310	3.69	4,817.57
" "	Sept. 12, 1940 to Sep. 22, 1940	912	3.54	3,232.25
" "	Sept. 24, 1940 to Oct. 9, 1940...	1298	4.10	5,325.65
" "	Oct. 9, 1940 to Oct. 22, 1940.....	1394	2.90	4,038.37
" "	Oct. 22, 1940 to Nov. 2, 1940...	1198	3.15	3,776.11
" "	Nov. 2, 1940 to Nov. 12, 1940...	1078	3.63	3,920.66
" "	Nov. 12, 1940 to Nov. 22, 1940	971	5.94	5,801.28
" "	Nov. 22, 1940 to Dec. 2, 1940...	1068	3.82	4,085.85
" "	Dec. 6, 1940 to Dec. 23, 1940...	1010	2.75	2,786.92
		16516		$64,395.39

During this period from July 3rd, 1940 to Jan. 1, 1941 we milled 16,516 tons which returned $64,395.39 or an average value of $3.90— per ton.

To this must be added the tie up and recovery from odds and ends such as scoop pit, classifier, etc., of $13,623.56 amounting to 82.48 cents per ton, which brings the value of the ore treated to approximately $4.72½ per ton for the period. This completes the report of operations to January 1st, 1941.

You will note some lost time which was due to a flu epidemic and some severe blizzards.

We are faced with a difficult situation. From the experience of the three winters we have operated we know the expenses are unavoidably increased and that the grade of the ore will not justify this increase.

We also know that it is expensive to shut down for five months of each year.

Repairs must be kept up from day to day or their cost increases out of all proportion, and expenses such as taxes and overhead do not stop.

Another thing that works against operating for a part of the year is the difficulty of getting and keeping key men at any price we can afford to pay.

No matter how good a man may be, he cannot hope to familiarize himself with our problems in less than six months. This is offset to some extent by my own familiarity with the property and its problems which, however, are constantly changing but there is no substitute for experience.

There is no hope of earning the money out of the property to meet our payments and in many respects our contract is unworkable.

When I made the original contract with the Collins Brothers we had no idea of the value of the property or its possibilities and it soon developed that in order for the buyers to carry on it would be necessary to modify it, which, as representative of the buyers, I did on several occasions.

As to the value of the property, it was, of course, any man's guess.

It has now developed that any selective mining is impracticable and that any such attempt would rob the mine as it is impossible to find most of the better ore without mining the poorer, and while there still exists the possibility of small bunches of rich ore, the limits and average grade of the ore are pretty well defined.

When the mine commenced to go to pieces last fall due to the water that seeped into the formation from the spring run off I did the only thing possible if any material part of the mine was to be saved and used all of the men and timber necessary to save what we could of it.

This delayed our preparations for the winter, very materially, for it was uncertain until the last moment whether we would be able to run during the winter or not.

This also used up the money we had accumulated for our Nov. 1st payments but it also saved the mine for the owners.

Since January first conditions have been worse. We finally succeeded in getting supplies in and got started up January 18, 1941. Prior to that date about half of our crew were snowed in without much to eat and got along on two meals per day during the blizzards that kept them marooned at Camp.

Up to February 1st we succeeded in milling 963 tons which returned $3.06 per ton or $2946.93. We did not have enough money to meet our payroll due February 1st until we received this remittance from the Mint.

It has been storming at the mine up to our last report February 14th.

Sincerely,

FRANK A. GARBUTT.

FAG-C.

CROSS-COMPLAINANT'S EXHIBIT W

FRANK A. GARBUTT
Suite 712—411 West Seventh Street
Los Angeles, California

February 5, 1941.

Mr. Harry Chandler,
Alice Clark Ryan:

Since the Log Cabin Mines Company took over the management of the mine it milled up to December 31, 1939, 12,777 tons, and in 1940, 35,652 tons, or a total of 48,429 tons which produced $264,610.17, or an average of $5.46+ per ton.

Of this amount, as nearly as I am able to estimate, the operating company was entitled to retain $8.00 per ton on 8400 tons and $5.00 per ton on the balance, a total of $267,345.

The amount of $264,610.17 was actually retained by it which did not repay its costs during the period.

Mr. Carter will prepare the annual statement as soon as his time permits and a copy will be forwarded to you.

LOG CABIN MINES COMPANY
By FRANK A. GARBUTT
Manager.

cc to Mr. Adams

[Title of District Court and Cause.]

DEPOSITION OF HELEN M. SUTHERLAND

Helen M. Sutherland, being first duly sworn by the Notary Public, was examined and testified as follows:

Direct Examination

By Mr. Abel:

Q. State your name.

A. Helen Maude Sutherland.

Q. And you are one of the plaintiffs in this action?

A. I am one of the plaintiffs in this action—yes, I am. Pardon me.

Q. State whether or not you were present in Spokane at the stockholders' meeting of Mutual Gold Corporation held on August 6, 1938.

A. I was not there.

Q. Were you represented at that meeting by proxy? A. No, sir, I was not.

Q. Who is Charles W. Sutherland?

A. My son.

Q. And he is one of the plaintiffs in this action?

A. Yes, sir.

Q. Do you know whether or not your son Charles W. Sutherland attended the stockholders' meeting of Mutual Gold Corporation on August 6, 1938? A. I know that he did not.

Q. You know that he did not?

A. I know that he did not.

Q. Do you know whether he gave any proxy or was represented at that meeting?

(Deposition of Helen M. Sutherland.)

A. He was not. He did not give anybody any proxy.

Q. State whether or not at any time prior to the organization of Log Cabin Mines Company you, as a stockholder of Mutual Gold Corporation, or otherwise, knew of the contemplated organization of Log Cabin Mines Company. A. I did not know.

Q. You did not know? A. No.

Q. State whether or not you have at any time or in any way consented to, approved or ratified the organization of Log Cabin Mines Company.

A. No.

Q. State whether or not you have at any time or in any way consented to, approved or ratified the transfer of the assets of Mutual Gold Corporation to Frank A. Garbutt, or to Log Cabin Mines Company. A. I have not.

Mr. Abel: That is all.

Cross Examination

By Mr. Grill:

Q. Did you receive a notice of the meeting of the stockholders of Mutual Gold Corporation, the meeting to be held on August 6, 1938? A. No.

Q. You never received a copy of the notice of that meeting? A. No.

Q. And did Mr. Vance—did Mr. Lloyd Vance later call upon you in Vancouver and discuss this suit with you? A. I talked with Mr. Vance.

(Deposition of Helen M. Sutherland.)

Q. With Mr. Vance, Senior? A. Yes, sir.

Q. Did he ever agree to pay the cost or the expenses of this suit?

A. No. There has been nothing said about it.

Q. At any time to you?

A. Not until Mr. Collins made the suggestion that where the plaintiffs were implicated in this trial, we might be responsible, and I took it up with Mr. Vance.

Q. And what did he then tell you?

A. He just naturally informed me that there would not be any danger of us—of the plaintiffs being implicated financially. That naturally he would be——

Q. Well, if this suit was successful did he guarantee to pay you for your stock a dollar a share, or anything of that kind?

A. He just simply told me that my shares would be worth a dollar a share.

Q. Well, did he say that he would pay you that for them?

A. Yes, if I wanted to sell—if I cared to sell.

Q. He would pay you a dollar a share for them?

A. If I cared to sell.

Q. Did you personally employ any of the attorneys in this case? A. No, sir.

Q. Do you know the name of the attorney in California handling the case?

A. I have heard his name, but I cannot tell you who it is.

(Deposition of Helen M. Sutherland.)

Q. Have you ever had any correspondence with him? A. No, sir.

Q. Have you ever given any instructions to him or to Mr. Abel regarding the suit?

A. Did I ever?

Q. Have you ever given any instructions to the attorney in California or to Mr. Abel regarding this suit? A. Not to my knowledge, no.

Q. Not to your knowledge? A. No.

Redirect Examination

By Mr. Abel:

Q. When was it Russell Collins made the suggestion to you that you have testified to on cross-examination?

A. That was—well, he was up there twice, Mr. Abel. It was when he was up there to see me.

Q. I asked you when. A. In Vancouver.

Q. Now, when was that?

A. Now, wait a minute. That was last Spring, I think, some time.

Q. That was after this suit was brought?

A. Oh, yes.

Q. And state whether or not he was trying to get you to drop out of the suit.

A. Yes. He tried to arrange—he was there to arrange that I would be taken off as a plaintiff in the case.

The Witness: Well, he stated that I might—that it might be bad for me if I was a plaintiff and

(Deposition of Helen M. Sutherland.)

we were to lose; that I might to a certain extent be one who would be held responsible, and I believe that he tried to get several of the plaintiffs to withdraw from what he mentioned.

Q. (By Mr. Abel) Now, I am not asking you for your beliefs. I am asking you for what he said when he called on you at Vancouver. Relate the conversation as nearly as you can.

A. Well, he was up there in the interests of the Mutual Gold Corporation.

Q. Just speak up.

A. And he informed me that Mr. Garbutt had taken over the controlling part of the mine and what would happen if this Mr. Garbutt did win his case, and he informed me that from the way the contract between the shareholders and Mr. Garbutt read, that they could not lose, that the way that they had the contract made out he could only claim a certain part of the mine.

Q. Now, who is Russell Collins?

A. Russell Collins is one of the shareholders and the man that I bought from. At the time he was one of the promoters of the mine—at the time that I bought my shares.

Q. Do you know whether or not he was a director of Mutual Gold Corporation at the time that he made these statements to you?

A. I am sure that he was at that time that we bought our shares.

(Deposition of Helen M. Sutherland.)

Q. No, not at that time, but I am speaking of the time that he made these statements to you about Garbutt and about the mine. What was his relation, if any, to Mutual Gold Corporation at that time?

A. Well, I am of the impression that he was still one of the directors.

Q. Where did he live at that time? A. He?

Q. Yes. A. Mr. Collins?

Q. Yes.

A. In California. I was under the impression that he was living at Leevining.

Q. Do you know how far distant that is from your residence in the city of Vancouver, British Columbia?

A. No, I don't. It would be about two thousand miles, I guess.

Q. Did he state whether or not he made a special trip up to see you?

A. Yes, he made a special trip up to see me. And he made a trip after that again.

Q. What was the occasion of his second trip?

A. Very much the same. He came back to inform me that his lawyer in California had directed him and had come to the conclusion that it would be better business to leave me on. I don't know about the others. That if they took me off they might come only on Mr. Vance and that would do more injury.

Q. Do you state that Russell Collins told you that? A. He did tell me that.

(Deposition of Helen M. Sutherland.)

Q. On what occasion was that?

A. That was on the second trip up to Vancouver.

Q. When was that?

A. He had in the meantime conversed with his lawyer in California.

Q. When was that?

A. That was in the spring of—well, it was last spring—the spring of 1940. This is 1941, so wouldn't that be 1940—last spring?

Q. Yes. I think that is all.

Recross Examination

By Mr. Grill:

Q. Now, you say that Mr. Collins made two trips to see you, Mrs. Sutherland? A. Yes.

Q. Did Mr. Vance come up to see you between the two trips—between the time that Mr. Collins made his first trip and the time that he made his second trip? A. Yes.

Q. Do you recall anything more than what you have testified to with reference to Mr. Vance's visit at that time between the two trips?

A. What Mr. Vance told me between the two trips?

Q. At the time that he saw you in Vancouver, do you recall your conversation with him?

A. No.

Q. Any more than what you have testified to?

(Deposition of Helen M. Sutherland.)

A. No. That was the only conversation that Mr. Vance and I had, and it was just merely through those two telegrams, that is all.

Q. Well, was he up there at that time? Did he talk to you on that occasion that you have just stated that he was up there, between the time that Russell Collins made the two trips?

A. That is all that I recall that he said.

Q. And what was that?

A. Well, the only thing that I can recall in regard to the conversation that we had, as to when he was up there——

Q. (Interrupting) That is what I am asking you about, as to when he was up there.

A. Well, he came up to have a talk with me, and to verify whether I would act as a plaintiff.

Q. You were then a plaintiff in the case, weren't you? A. What is that?

Q. You were then a plaintiff in the case, weren't you—at that time?

A. At that time I was a plaintiff in the case, yes.

Q. And nothing further was said about his responsibility for the costs? A. No.

Q. And expenses?

A. No. There was nothing said at that time. It was after Collins came up that he put the idea in my head. I hadn't thought of it before.

Q. Then Mr. Vance spoke to you later about that, did he?

(Deposition of Helen M. Sutherland.)

A. Mr. Vance was only up the once.

Q. Do you recall when that was?

A. That was just in between the two calls that Russell Collins made.

Q. I see. Now, when was that?

A. I haven't got the exact date. It was—well, I haven't got the exact date because I didn't know that it would be brought up.

Q. How long did you have the conversation with him—for about how long?

A. With Mr. Vance?

Q. Yes.

A. About the Mutual Mine we had a conversation possibly for half an hour, or something like that—just in a casual way.

Q. (By Mr. Grill) What did he state about the mine at that time?

A. Well, Mr. Vance stated that Mr. Garbutt was bringing a suit in California, and that he wanted to know if I was willing to carry on as plaintiff. There really wasn't anything——

Q. (Interrupting) Did he state anything about the mine management at that time to you—about Mr. Garbutt's management? A. No.

Q. As a matter of fact, you don't remember very much about the conversation, do you?

A. No, I don't. I will tell you, Mr. Vance was up there and he made a personal call upon my husband and me, and I think the main thing that

(Deposition of Helen M. Sutherland.)
he came up for was to see if I was going to be—to decide whether or not I was going to be one of his plaintiffs.

[Title of District Court and Cause.]

DEPOSITION OF G. H. FERBERT

I am a Stockholder of Mutual Gold Corporation and have been one continuously since the fall of 1933. I own about 90,000 shares. From the time I first took stock in 1933, up until through the fall of 1937, I made advances and took treasury stock for them. I also bought a hundred thousand shares of stock at a cent a share, and I bought some at a cent and a half a share. I sold this stock for what I paid for it, and there was no profit in it and no loss. I was elected a director of the corporation in 1936 and took the directors' oath in August, 1938. I have been one continuously since. The corporation owes me, I think, between $1,200 and $1,300 which I have advanced since May, 1938. I advanced moneys to pay lumber bills, the Lone Pine Lumber Company, Bishop Hardware Company in Mono County, California, watchman's wages to Mr. Sturgeon, and minor bills in Spokane for the office. I advanced money to the office, and they paid it out for bills, whatever they were. I am conversant with the business affairs of the corporation, and have been since I became a Stockholder, and especially since I became a director.

(Deposition of G. H. Ferbert.)

The corporation needed new mining equipment but did not have the money to buy it, or to operate with the old equipment. It did not have the money to pay an installment of $10,000.00 falling due on November 1, 1938 to the owners. I did not know of any way by which it could raise any more money.

Lloyd Vance made a written offer to the Board of Directors to finance the company on certain conditions, but I did not favor it. I proposed to go to California and get a contract with Frank A. Garbutt or someone that he would interest for us. I went to Los Angeles with Mr. Stiegler and Mr. Grill —I believe Mr. Collins was down there—to see Mr. Garbutt about that contract. As director, I voted for the Garbutt contract in preference to the Vance contract. I based my opinion on the man himself. I wanted him on account of his experience. He had been at mining for a lifetime and he was financially responsible, and I thought we would get a fair deal.

The Stockholders' meeting of September 24, 1938 was called off upon advice of counsel, who stated that the Stockholders had already conferred all the powers they had upon the board. No further power was necessary. I paid my own expenses as director. They consisted of traveling expenses to Yakima, Spokane and Seattle, railroad fares to Los Angeles, hotel bills, telephone, telegraph, tolls. I have never been repaid. Mr. Garbutt never advanced me any money in connection with his dealings with Mutual Gold Corporation property.

(Deposition of G. H. Ferbert.)

Q. When did you first meet Frank A. Garbutt?

A. I think I met him in 1935.

Q. Where did you meet Garbutt?

A. It was on business for this company. That is how I came to meet him.

Q. In 1935?

A. I think it was in 1935. It might have been early in '36.

Q. When did you next meet Garbutt in connection with Mutual Gold Corporation?

A. After the meeting in Spokane, the 6th of August, when Mr. Collins and I—let's see—I think after the mill shut down. I was in Los Angeles, and I went up to Mr. Garbutt's office with Mr. Keily, that would be '37—no, that would be '38, wouldn't it, in the spring of '38.

Q. Can you give an approximate date in 1938 that you first met Garbutt in connection with Mutual Gold business?

A. I went there on business. Yes, I can give you an approximate date.

Q. Do so.

A. When Mr. Collins and I were sent to California by the board from Spokane. That would have been August 7 we left there.

Q. What year?

A. 1938, when we went down and tried to interest him in a contract.

Q. Did you attend the stockholders' meeting and the directors' meeting on August 6, 1938?

(Deposition of G. H. Ferbert.)

A. Yes.

Q. Of Mutual Gold? A. Yes.

Q. Was there any discussion between you and Garbutt before August 5, 1938, or with you and Keily before that date, with respect to the terms, conditions and provisions of any deal with Garbutt?

A. I never discussed a deal with Mr. Garbutt until Mr. Collins and I left Spokane and went down there for a contract.

Q. What date?

A. That would have been the day after the meeting, August 7th we went down, I guess we went down in two days. It would be around the 9th of August.

Q. On August 7 or thereabouts, 1938, did you then go to Los Angeles? A. Yes.

Q. With Mr. Collins? A. Yes.

Q. How many days were you at Los Angeles?

A. Well, I think we were there one, probably one and a fraction. We weren't there very long.

Q. Did you see Garbutt? A. Yes, sir.

Q. How long were you with him?

A. Oh, I guess a half a day talking.

Q. Who was there?

A. Mr. Garbutt, Mr. Collins, myself, and at times his stenographer, and I don't recall anyone else.

Q. Now, would you tell all that took place at that meeting with reference to Mutual Gold Corporation and a proposal to sell an interest in the property of Mutual Gold Corporation?

(Deposition of G. H. Ferbert.)

A. Oh, I don't think, Mr. Abel, I could do that.

Q. To the best of your ability, tell in general what the conversation was on the subject.

A. Well, the subject was, I asked Mr. Garbutt if he would give us a contract and he would take this proposition up. He didn't seem to care whether he did or not, but he eventually did, yes.

Q. What was said about a deal and what kind of a deal?

A. Well, I can remember one thing: I don't remember much about the details, but what I wanted to do was get a contract back to the Board and show them that I could get one; but I remember this remark he made. He said, "I may not be able to give you as good a contract as Mr. Vance." I said, "I will judge that," and so did Mr. Collins.

Q. Is that all he said about what kind of a deal?

A. That is all I recall; that stuck in my memory.

Q. That it wouldn't be as good a deal as with Mr. Vance?

A. No, no; get it right. He said, "I may not."

Q. Did he intimate what his proposal would be?

A. Oh, he had a rough sketch which we brought back. You saw it. We had to hurry.

Q. What did Garbutt say about the Mutual Gold Mine, the property itself?

A. We didn't discuss it. He knew more about it than we did.

Q. How do you know that?

(Deposition of G. H. Ferbert.)

A. Because he has been taking care of it for years.

Q. How do you know that?

A. Well, that is a guess, but I have learned a whole lot about him since. He is very thorough.

Q. Are you testifying to hearsay on that subject? A. Well, maybe.

Q. Did you ever see Garbutt at the property itself? A. No.

Q. You referred to a proposal that was made, and you say that I knew about it. Do you refer to the de Mille proposal?

A. I refer to the contract that Mr. Collins and I brought back. I don't know where it is now. I haven't got one.

Q. Did you bring back a contract?

A. We brought a tentative contract. No, there was nothing signed.

Q. When did you first hear discussion concerning the organization of a new corporation to take over the assets of Mutual Gold Corporation?

A. When did I first hear of that?

Q. Yes.

A. Why, I think somebody sent me a tentative agreement, in which an offer was made by Lloyd Vance, at Georgetown, California, it must have been in July sometime; and Lloyd Vance was going to organize a company, and he was to take 60% and the Mutual was to get 40%. I think that was the

(Deposition of G. H. Ferbert.)

first time I heard of a company, outside of the proposition made at the directors' meeting in March, in which we were all authorized, the directors were authorized or anyone else——

Q. Were you at Los Angeles again during August, 1938?

A. I didn't go back until we went back and got —when we went back with Mr. Grill and Mr. Stiegler and got the September 2 agreement.

Q. Now, when did you get to Los Angeles to negotiate that agreement?

A. Oh, September 2,—probably the last days of August. I can't give you that date.

Q. How long were you negotiating that agreement before its execution on September 2, 1938?

A. I think we were a couple of days.

Q. Was much time consumed in arriving at the agreement of September 2?

A. Well, Mr. Grill and Mr. Garbutt both did the work. I wasn't present all the time.

Q. Did you make any proposals as to what should go into that contract?

A. No, I don't recall it.

Q. Do you recall any proposal from any director of Mutual Gold Corporation as to what should go into the contract?

A. Well, I don't know what Mr. Grill put in. I did make one proposal, yes.

Q. What was that?

(Deposition of G. H. Ferbert.)

A. I made a proposal about moneys.

Q. What proposal did you make?

A. That we raise money to pay off our open accounts.

Q. In other words, pay the creditors of Mutual Gold? A. Yes.

Q. And was that turned down? A. No.

Q. Was it embodied in the contract?

A. I don't recall. I know that Mr. Garbutt arranged the loan in our presence, $25,000. We were to pay off our open accounts, and he was going on the note.

Q. What day was that? A. Pardon?

Q. Was that on or about September 2?

A. Yes, I think that was on that—I am sure it was part of the discussion.

Q. Do you testify that, in the negotiation of the contract of September 2, 1938, that Garbutt was to loan money to pay the creditors of Mutual Gold Corporation?

A. No, I didn't say that. I said that he negotiated a loan with the bank for the Mutual Gold, and he was going on the note, to pay the creditors of Mutual Gold.

Q. What bank was that?

A. I know where it is. I can't give you the name. Citizens', Los Angeles Citizens' Trust and Savings, or something; but I can't give you the name.

Q. What was the conversation on that subject? What was said about $25,000 at that meeting?

(Deposition of G. H. Ferbert.)

A. We asked and Mr. Garbutt agreed to borrow $25,000 for the Mutual Gold, to pay off the indebtedness.

Q. And about what date was that, that he made that agreement?

Mr. Grill: I think he stated that.

Q. (By Mr. Abel) September 2, you say, or about that?

Mr. Grill: He said about September 2.

A. I said that, yes.

Q. (By Mr. Abel) Who was present at that meeting?

A. Mr. Stiegler, Mr. Garbutt, Mr. Grill, Mr. Collins and myself.

Q. Was that agreement of Garbutt's to procure for the Mutual Gold $25,000, part of the contract of that date?

A. No, there was nothing in the contract.

Q. Why was it omitted?

A. Well, I can't tell you exactly why it was omitted. I know the reason was never pressed is because we had no use for the money.

Q. I thought that the purpose of the whole transaction was to obtain money to relieve the financial necessities of Mutual Gold Corporation?

A. But we didn't need the money.

Q. What is your answer?

A. We couldn't use the money so we never tried to get it, never asked for it.

(Deposition of G. H. Ferbert.)

Q. Well, I thought you said that Garbutt agreed to furnish the money?

A. Yes, if we needed the money, he agreed to it; but when we came back here and asked Mr. Vance, he wouldn't accept the money, so we didn't borrow it. That wasn't in the contract. It isn't in there.

Q. Did you not state that part of the contract was that Garbutt was to advance $25,000?

A. No, I don't recall stating that. Probably it was that I proposed. You asked me if I made any proposal. It wasn't incorporated.

Q. What did Garbutt say to that?

A. He said he was willing to help us raise the money.

Q. On what security? A. Stock.

Q. Stock in what?

A. In the Log Cabin Mines.

Q. The Log Cabin Mines hadn't been thought of at that time, had it?

A. We understood he was going to organize a company. I don't know what he was going to call it as far as that goes.

Q. What was your next dealing with Garbutt on behalf of Mutual Gold Corporation in which you participated?

A. Well, the next, I went down to California, Mr. Abel.

Q. When?

A. Oh, I don't know the date, but I think that Mr. Garbutt withdrew from his contract and acted

(Deposition of G. H. Ferbert.)

as a trustee. Then we made another contract December 17, and I was in California at the time.

Q. Well, I want the next transaction after September 2.

A. I participated in that and signed that, that is all.

Q. What contract? A. December 17.

Q. Do you remember any Mutual Gold transaction with Garbutt, which you participated in, subsequent to September 2; and if so, just tell what.

A. No, I didn't—that was carried on with the Board up here, and I was down there.

Q. Do you mean to say, then, that you had nothing to do with the negotiations or dealings with Garbutt after September 2, '38?

A. I saw the agreements, and looked them over, and agreed with them; but no, I didn't talk to Mr. Garbutt, I didn't discuss it.

Q. Then you didn't meet with the Board of Mutual Gold? A. No. I was in California.

Q. And when did you next meet with the Board of Mutual Gold after September 2, '38?

A. After September, '38? I have no recollection. I can't tell you. It would have been '39. I don't know.

[Title of District Court and Cause.]

DEPOSITION OF HELEN MAUDE LORENZ

(1). State your name, age and present residence.

A. Helen Maude Lorenz, fifty-one, residence 1785 Southwest Montgomory Drive, Portland, Oregon.

(8). State whether or not you gave to J. E. Stiegler a proxy to be voted by him at the meeting of the stockholders of Mutual Gold Corporation held August 6th, 1938 at Spokane, Washington.

A. Yes.

(9). If you answer Interrogatory No. 8 in the affirmative, state the time, place and circumstances of the giving of said proxy to J. E. Stiegler, and whether the giving of said proxy was solicited by Mutual Gold Corporation, or the management of said corporation.

A. About August 6, 1938, I received at Portland, Oregon, from the Mutual Gold Corporation, a letter to stockholders, notice of annual meeting of stockholders of Mutual Gold Corporation, and a proxy, which proxy, as I remember, appointed J. E. Stiegler as my proxy. The giving of said proxy was solicited by Mutual Gold Corporation, the letter being signed by J. E. Stiegler, President, and the notice of meeting being signed Mutual Gold Corporation, by E. Fuson, Secretary.

(10). If you answer Interrogatory No. 8 in the affirmative, please produce each and every letter or notice received by you from Mutual Gold Corpora-

(Deposition of Helen Maude Lorenz.)

tion, the secretary or manager thereof, in respect to said meeting or said proxy, identify the same and attach to this deposition.

A. I now produce Notice of Annual Meeting of Stockholders of Mutual Gold Corporation, setting date of meeting as August 6, 1938, which I have marked Exhibit "A"; also letter signed J. E. Stiegler, President, dated July 20, 1938, written on letterhead of Mutual Gold Corporation, 401 Fernwell Building, Spokane, Washington, which I have marked Exhibit "B"; also proxy for signature, dated the 21st day of July, A. D. 1938, which I have marked Exhibit "C".

(11). State whether or not you identify "Exhibit A" hereto attached as a notice received by you of a stockholders' meeting of Mutual Gold Corporation to be held August 6th, 1938. A. I do.

(12). If you answer Interrogatory No. 11 in the affirmative, that you identify said notice, state the time, place and circumstances of receiving said notice and what, if anything, you did in respect to attending said stockholders' meeting or issuing a proxy to J. E. Stiegler, to be voted thereat.

A. I received the notice in the ordinary course of mail. After receipt of proxy I signed it and returned it to Mutual Gold Corporation.

(13). State whether or not you identify "Exhibit B" hereto attached as a letter received by you, signed by J. E. Stiegler, re stockholders' meet-

(Deposition of Helen Maude Lorenz.)

ing of Mutual Gold Corporation to be held August 6th, 1938. A. I do.

(14). If you answer Interrogatory No. 13 in the affirmative, state the time, place and circumstances of receiving said letter.

A. I received the letter at Portland, Oregon, in the customary course of mail, about August 6, 1938.

(15). State whether or not you identify "Exhibit C" hereto attached as a proxy to be voted at the meeting of Mutual Gold Corporation held August 6th, 1938, copy of which was received by you.

A. I do.

(16). If you answer Interrogatory No. 15 in the affirmative, that you do identify said proxy, please state the time, place and circumstances of receiving the same, and what, if anything, you did in respect to issuing the proxy to J. E. Stiegler, to be voted at said meeting.

A. I received said proxy on or about August 6, 1938, at Portland, Oregon, in the ordinary course of mail, and I issued the proxy to J. E. Stiegler, to be voted at said meeting, and mailed the same to Mutual Gold Corporation in Spokane, Washington.

(17). State generally when, if at all, you received "Exhibits A, B and C", or any thereof, and all the circumstances of such receipt.

A. I received Exhibits "A", "B" and "C", on or about August 6, 1938, in the ordinary course of

(Deposition of Helen Maude Lorenz.)

mail. There were no special circumstances surrounding the receipt of same.

(18). State generally what, if anything, you did upon receiving, and pursuant to the receipt by you, if you did receive, "Exhibits A, B, and C".

A. I read the documents carefully, and then signed the proxy and mailed it to Mutual Gold Corporation.

(19). State your place of birth, and whether or not you have always been a citizen of the United States.

A. I was born in Greensboro, North Carolina, and have always been a citizen of the United States.

(20). State whether prior to the commencement of this action you were over the age of twenty-one years. A. Yes.

(21). State whether you have at any time, prior to the organization of Log Cabin Mines Company, been informed, as a stockholder of Mutual Gold Corporation, or otherwise, of the organization of Log Cabin Mines Company.

A. No. I never heard of Log Cabin Mines Company until after the commencement of this action.

(22). If you answer Interrogatory No. 21 in the affirmative, state generally and specifically the time, place and circumstances under which you received information of the organization of Log Cabin Mines, and generally and specifically what information, if any, you did receive.

(Deposition of Helen Maude Lorenz.)

A. Never heard anything regarding anything of the organization of Log Cabin Mines.

(25). State whether or not you have at any time, or in any way, consented to, approved, or ratified the organization by Mutual Gold Corporation of Log Cabin Mines Company.

A. No, I have not.

(26). If your answer to Interrogatory No. 25 is in the affirmative, state the time, place and circumstances, generally and specifically, of such consent, approval or ratification. If your answer thereto is in the negative, state any and all circumstances, generally and specifically, relative to such non-consent, non-approval and non-ratification.

A. My answer to Interrogatory No. 25 is in the negative. When I learned of the organization of the Log Cabin Mines and that this present suit was being contemplated, I wired Mr. Abel at Los Angeles, to be joined as plaintiff, in order to protect my interests.

DEPOSITION OF MILTON I. HIGGENS

Milton I. Higgens, being first duly sworn by the Notary Public, W. R. Sampson, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. State your name, please, resident and occupation.

(Deposition of Milton I. Higgens.)

A. Milton I. Higgens, chiropractor, Coeur d'Alene, Idaho.

Q. How long have you lived in Coeur d'Alene?

A. Seven years.

Q. That is your place of residence?

A. Yes.

Q. Are you the M. I. Higgens that is named as a plaintiff in the case entitled Helen M. Sutherland, Charles W. Sutherland, M. I. Higgens, et al, against Frank A. Garbutt? A. Yes.

Q. Now pending in the District Court of the United States for the Southern District of California, Los Angeles? A. Yes.

Q. When, if at all, did you first learn, that is, approximately, of a suit brought in the State Court in Los Angeles, California, by the Log Cabin Mines Company, a corporation, to quiet title in it; that is, the plaintiff Log Cabin Mines Company—to what is known as the purchase contract—that is, the contract for the purchase of these mining properties in Mono County, California? Did you or did you not ever learn of a case of that kind, a suit to quiet title in the Log Cabin Mines Company to the mining claims for the purchase of which the Mutual Gold had a contract?

A. Yes, I had heard of it.

Q. Can you state approximately when you first heard of that suit?

A. I believe it was in the fall of 1939.

(Deposition of Milton I. Higgens.)

Q. Could you say any more definitely than that? I am not trying to pin you down. Do you want to state any more definitely than that?

A. Well, I could say that it was around Thanksgiving time——

Q. (Interposing) In 1939? That is close enough.

A. As I recall. Around Thanksgiving time.

Cross Examination

By Mr. Weller:

Q. You received notice of all of the stockholders' meetings that were held; that is, you received a number of notices? A. Oh, yes.

Q. One every year, at least, for an election of the directors and so forth? A. Yes.

Q. And you didn't attend any of those meetings after about 1935? A. I don't think so.

Q. You say, Doctor, that you were given to understand that the company was having certain dealings which you believed wrong. Then it wasn't Mr. and Mrs. Sutherland or Mrs. Lorenz that gave you to understand those facts or what you thought were facts? A. No, not directly.

Q. Who was it that gave you that understanding?

A. Well, there was—I don't know all the people at some of the meetings that I have talked with. I relied largely on my own conclusions from reading——

Q. (Interposing) Reading what?

(Deposition of Milton I. Higgens.)

A. (Continuing) —reading the information sent out by the various—the circular letters.

Q. Sent out by whom?

A. Well, who were they sent out by? Stiegler and Garbutt and other circular letters that were sent out.

Q. You formed your impression by the letters sent out by Mr. Stiegler and Mr. Garbutt that there was something wrong? Is that correct?

A. There had to be something wrong, yes.

Q. Why?

A. Because there was a question of opinions there.

Q. Why did there have to be something wrong?

A. Wherever there is dissension or two different opinions——

Q. (Interposing) Well, who dissented from those letters of Stiegler and Garbutt?

A. Well, Collins' letters and things like that. There was a controversy of opinion.

Q. Who was controverting the opinions of which you speak, of Mr. Garbutt?

A. Mr. Vance, for one.

Q. Anybody else? A. I can't recall.

Q. You verified the complaint in this action, didn't you, Doctor? A. Yes.

Q. Did you give the attorneys the information which they set forth in the complaint?

A. No, not all.

(Deposition of Milton I. Higgens.)

Q. Did you give them any?

A. I confirmed it.

Q. Were you acquainted with Mr. Moore?

A. At that time?

Q. Yes. A. No.

Q. Were you acquainted with Mr. Abel?

A. No.

Q. Mr. W. H. Abel?

Mr. Moore: At what time do you mean, Mr. Weller?

Mr. Weller: At the time the complaint was prepared and signed. (Q). Had you seen either of them at that time, at the time of preparing and signing the complaint, either Mr. Moore or Mr. Abel, the attorneys of record?

A. At the time of signing, yes.

Q. Which one, or both?

A. Mr. Moore, I think. I think it was probably about the time of the signing.

Q. Was it before or after?

A. I am trying to recall.

Mr. Weller: Q. What information did you give to Mr. Moore at that time?

A. Confirmation of my understanding of the conditions, of my opinion.

Q. You had, then, I take it, Doctor, no personal knowledge of the facts here?

A. That is right.

Q. So what you told Mr. Moore was an understanding that you had arrived at from communica-

(Deposition of Milton I. Higgens.)

tions you had received from Mr. Vance?

A. Not necessarily from Mr. Vance, no.

Q. Then from whom?

A. From communications I had received from Garbutt, Stiegler and Vance as well.

Q. Did you employ Mr. Moore and Mr. Abel, or either of them, Doctor, to act as your attorneys in this case? A. No, not then.

Q. You didn't pay them any money as a retainer, or otherwise? A. No.

Q. Did you agree to pay them any money for acting for you?

Mr. Moore: That is objected to as a privilege.

A. No.

Mr. Weller: Q. Do you have an understanding with anyone, Doctor, that you will not have to pay any money to anybody on account of costs, that is, or otherwise in this case?

A. No, I have no such understanding. I have been informed of such.

Q. You have been informed? By whom?

A. A little red-haired man over in Yakima told me that all of the expenses of the thing was coming back on my personal shoulders. I don't recall his name. He is a broker over there—Peterson, I believe.

Q. I think you misunderstood my question. (Question read)

A. No. I had no such understanding with anyone.

(Deposition of Milton I. Higgens.)

Q. You haven't been advised by anyone that you will not be required to bear any of the expenses of this case?

A. No, none whatever. I haven't been advised of that.

Q. How did it happen, Doctor, that you and the Sutherlands and Mrs. Lorenz got together and all together were named as plaintiffs in this case, you not having met any of them or having had no correspondence with them, but named with you as plaintiff in this case?

A. Well, Mr. Bateham mentioned it. He mentioned the proposition and explained to me in a way what the intention of the minority group was to do.

Q. Did you ask to become one of the plaintiffs?

A. He asked it. He suggested it, and he said if I cared to I might.

Q. Did he tell you who was causing the action to be brought at that time? A. Yes.

Q. Who did he say?

A. The Mutual Gold, as I understood.

Q. No. Who was causing this action to be brought in which you were one of the plaintiffs? You say he asked you to be one of the plaintiffs. Did he tell you who was causing this action to be brought in which you were to be named as plaintiff?

A. No, he didn't mention the person, I don't believe.

Mr. Moore: He? Mr. Bateham, I understand you are referring to.

(Deposition of Milton I. Higgens.)

Mr. Weller: Q. Mr. Bateham didn't mention the name of anyone who was causing this action to be brought?

A. No. I understood that perhaps Mr. Bateham was going to do it himself, as far as I understood.

Q. You didn't know, then, who was bringing this action in which they were asking you to act as plaintiff?

A. I knew it was a group of stockholders.

Q. Was any explanation given to you at all of any kind, whether lengthy or not, as to why they wanted you to be one of the plaintiffs?

A. No.

Q. No reason at all? A. No, he didn't.

Q. Just out of thin air Mr. Bateham came to you and asked you to be one of the plaintiffs in this action, you being a resident of Idaho and the action being brought at Los Angeles in the Federal Court? Is that correct? A. Yes.

Q. So the only one whose letters complained about the deal that you have mentioned would be Mr. Joe Vance? Is that correct?

A. Yes, I think so.

Q. Doctor, did you ever receive any letters from Joe Vance asking you to become one of the plaintiffs in this action? A. Positively not.

Q. Or anyone writing for him?

A. No, no; positively not.

Q. Was there at any time any representation made to you by anyone that in no event, without

(Deposition of Milton I. Higgens.)

regard to the outcome of this case, would you be required to bear any expense or attorneys' fees in connection with the case?

A. No, I had no——

Q. (Interposing) But you say, as I understood you, that you didn't hire Mr. Moore as attorney in the case? A. No, I didn't.

Q. You didn't hire Mr. Abel as attorney in the case? A. No, I didn't.

Q. You didn't hire Mr. Anderson in Los Angeles as attorney in the case? A. No, I didn't.

Q. You don't expect to pay for any attorneys' fees?

A. I don't know. If the case reverses and it falls on the plaintiffs I will probably pay my share.

Q. This complaint was verified by you on the 14th day of December, 1939, before Mr. Arney?

A. Yes, sir.

Q. Now, Doctor, I am not trying to mislead you or tangle you up. The dates are not so material except for this: Had you ever seen this complaint or discussed it with anyone before the date that you signed it before Mr. Arney?

A. Oh, yes.

Q. You had? A. Yes.

Q. With whom? A. With Ward Arney.

Q. How long before—more than a day or two?

A. Yes, several days.

Q. And it was the same complaint that you discussed with him which you afterwards signed?

(Deposition of Milton I. Higgens.)

A. Oh, yes, just like it.

Q. So that you didn't see the complaint nor have any discussion about it with anyone prior to the time it was sent to Mr. Arney for you to sign? Is that correct?

A. I had talked about it with Mr. Bateham.

Q. Did Mr. Bateham have a copy of the complaint with him? A. Yes.

Q. He did?

A. Yes, I think he is the one that presented it to me when I took it before my attorney.

Q. That was at the time when it was sent you as completed, ready for you to sign. Is that what you mean?

A. I don't think it was quite completed then.

Q. It wasn't? A. I don't think so.

Q. Who completed it?

A. I don't know, exactly, but it was through Mr. Bateham.

Q. You say Mr. Bateham gave it to you to take to Mr. Arney? A. To look it over.

Q. And you took it to Mr. Arney?

A. I looked it over and took it to Mr. Arney, yes.

Q. So the completed complaint, the first time you saw it, the completed complaint was turned over to you for your signature and after examining it you did sign it before your attorney; is that correct?

(Deposition of Milton I. Higgens.)

A. There were some—the first one there were a few minor changes, which were minor, if any, yes, but essentially that is correct.

Q. That is correct? A. Yes.

Q. Then the information that is in this complaint that you signed on the 14th day of December, 1939, was not furnished by you to Mr. Moore or to Mr. Abel? Is that correct?

A. Yes, that is correct.

Q. Then you don't know, I assume, then, who induced Mr. and Mrs. Sutherland and Mrs. Lorenz to become joint plaintiffs with you or how they happened to become plaintiffs?

A. I was under the impression that——

Q. (Interposing) No. I asked you if you know, not what your impression was.

A. No, I don't know.

Q. Do you know where the Sutherlands live?

A. No.

Q. Do you know where Mrs. Lorenz lives?

A. No.

Redirect Examination

Q. Did you and Mr. Bateham have any discussion as to your satisfaction or dissatisfaction with the condition of the affairs of the Mutual Gold and in the way it was being conducted?

A. Yes, we discussed it at length.

Q. And state whether you ever heard, from Mr. Bateham or anyone else, of a stockholders' com-

(Deposition of Milton I. Higgens.)

mittee that was taking an interest in the affairs of this corporation, Mutual Gold, in opposition to what was being done by the management and control. A. Had I heard of it?

Q. Yes. A. Yes, I had heard of it.

Q. Was that an organization of which Mr. Bateham was a member or chairman?

A. Yes, something like that. I don't know the details of it.

Q. Did Mr. Bateham refer to that? Did he or did he not in his talk with you, in the discussion of what the attitude of the stockholders was?

A. Yes, he discussed the attitude of the stockholders, yes, indeed.

Q. But you don't recall now, or do you recall that he referred to a committee of stockholders that were making it something of their business?

A. He did, he referred to it.

Q. Can you say any more definitely approximately how long you had this complaint that you subsequently signed under consideration or advisement as to its form and substance?

A. Well, as I recall, it must have been—I said days before, and if I say a week or ten days, as I recall, it was approximately that.

Q. Is it correct or incorrect to say that on that consideration you formed your own conclusions as to what you wanted to do as to signing?

A. That is correct.

(Deposition of Milton I. Higgens.)

Q. What is correct?

A. It is correct that while I had that under advisement my opinion was formed and I decided to sign it.

Q. Was that after consulting with your own attorney, Mr. Arney?

A. That is right, and after my own consideration of it.

Q. Did Mr. Arney go into any consideration as to the nature of the case and the reasons for your signing it, the advantages or disadvantages that might accrue to you from signing it?

A. He did discuss it with me.

Mr. Moore: I want to recall the doctor for a moment.

(Whereupon, Dr. M. I. Higgens was recalled and further testified as follows):

Redirect Examination

By Mr. Moore:

Q. One other question I want to ask you. Did you know, or had you ever received notice from the Mutual Gold or any other source of the bringing and pendency in Los Angeles of this what we call a title quieting suit that was brought by Mr. Garbutt, prior to the fact that it went to judgment by default? A. No.

Q. You didn't know it until after it had gone to default? A. I didn't what?

(Deposition of Milton I. Higgens.)

Q. You didn't learn that it had been brought until you learned that a judgment had been entered? A. No.

DEPOSITION OF MAYBELLE HIGGENS

Mrs. Maybelle Higgens, being first duly sworn by the Notary Public, W. R. Sampson, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Please state your full name for the record.

A. Maybelle Higgens, Coeur d'Alene, Idaho.

Q. Dr. Higgens, who just testified, is your husband? A. Yes.

Q. And you live at the same place in Coeur d'Alene, Idaho? A. Yes, sir.

Q. For the same number of years.

A. Yes.

Q. Are you the same Maybelle Higgens since named as one of the plaintiffs in this case?

A. I am.

Cross Examination

By Mr. Weller:

Q. Mrs. Higgens, did you have anything to do with the preparation of this complaint which was signed by your husband as one of the plaintiffs?

(Deposition of Maybelle Higgens.)

A. He discussed it with me.

Q. At the time or just prior to the time that he signed it? A. Yes.

Q. Did you ever see the complaint prior to a few days before it was signed when it was handed to your husband? A. No.

Q. Had you ever talked with Mr. Moore? Were you acquainted with Mr. Moore at that time?

A. No.

Q. Were you acquainted with Mr. W. H. Abel of Montesano? A. No.

Q. They are the attorneys named in the complaint in the action? A. Yes.

Q. You didn't know either of them?

A. No.

Q. Never had seen them? A. No.

Q. The only thing you knew about this complaint was that when it was handed to your husband, Dr. Higgens, for signing that you and he discussed it. Is that correct? That is all that you knew about the complaint?

A. I knew that it stood for the principles that I was standing for.

Q. And you knew also, Mrs. Higgens, that that principle that you were contending for was opposed by a majority of the outstanding stockholders of the Mutual Gold, did you not?

A. Yes.

(Deposition of Maybelle Higgens.)

Recross Examination

By Mr. Weller:

Q. You received notice of stockholders' meetings to be held at various times? A. Yes.

Q. You didn't attend any of them?

A. No.

Q. You didn't even send in your proxy to any of them, did you? A. I don't remember.

Q. I will ask you if it is not a fact that in these meetings, particularly the last two meetings which have been discussed here, on August 6, 1938 and February 1, 1939, that neither you nor Doctor sent in your proxies to be voted in favor of what you thought should be done at those meetings?

A. I couldn't tell you. We received so many of them, so many circulars, I wouldn't be able to tell.

Q. Would you say that you had sent them in?

A. No.

Q. Then, as I get it, Mr. Bateham asked you if you were willing to be a plaintiff in an action to be brought against the Mutual Gold Corporation, Garbutt, and the Log Cabin Mines and all the rest of them? Is that it?

A. After discussing it with me, yes.

Q. And you said that you would?

A. Yes.

Q. Did he tell you then that there were going to be other plaintiffs in the action? A. Yes.

Q. Did he tell you who they were?

A. I think so.

DEPOSITION OF A. P. BATEHAM

A. P. Bateham, being first duly sworn by the Notary Public, W. R. Sampson, was examined and testified as follows:

Direct Examination

By Mr. Moore:

Q. Your name is A. P. Bateham? A. It is.

Q. And you reside in Spokane? A. I do.

Q. How long have you lived here, Mr. Bateham, approximately? A. Oh, twenty years.

Q. Are you a stockholder in the Mutual Gold Corporation? A. I am.

Q. And about how long have you been such stockholder?

A. Oh, five or six years; I don't remember.

Q. And how much stock, if you recall, stands in your name?

A. I put that down on a paper or envelope and then didn't bring it over; 2000, I think; 2000 or 3000, maybe.

Q. What can you say in regard to an association of stockholders which has been broadly referred to as the Stockholders' Protective Association of the Mutual Gold minority stockholders? Do you know anything about such an organization?

A. Yes. It was formed at a meeting—at an adjourned meeting. The stockholders had convened in Dr. Collins' office, the office of the Mutual Gold, pursuant to a call which was afterwards rescinded.

(Deposition of A. P. Bateham.)

Those who came there adjourned over to my office in the Symons Block and discussed matters and near the close of the meeting it was moved and adopted that a stockholders' protective committee be named, of which I was to be chairman. Mr. Woodworth also was named as a member of the committee and I was to appoint another one, which I did, and I appointed Mr. C. H. Colby. That was the start of the committee, which was to take any action that seemed advisable in the interests of stockholders with respect to what we thought was a wrong action of the Board of Trustees of the Mutual Gold.

Q. Bearing in mind that Mr. Garbutt became active in the affairs of the Mutual Gold along about the first of September, 1938, about what time would you say this organization was formulated?

A. Well, it was in the fall of '38, as I remember. September, wasn't it? It was the date of that special meeting that was called after it was rescinded.

Q. When was that, sometime in the fall of '38?

A. Yes. I think it was in September. I went back to the office to get those record papers and I found them and then didn't bring them. I piled them up on the desk and went off.

Q. Were you chairman of that committee?

A. Yes.

Q. To what extent thereafter did you concern yourself as the chairman and as a stockholder of

(Deposition of A. P. Bateham.)

the Mutual Gold in the matter of doing what you thought was advisable for the protection of the best interests of the Mutual Gold?

A. Why, we had several meetings at which information was received from the Mutual Gold or its operations were discussed, and I think we agreed upon two letters that were sent out to all stockholders, and in order to carry on the suit to prevent the confirmation of their sale, of the directors' sale, I went up on behalf of the committee— We agreed that there should be a stockholder from outside of the state included in the plaintiffs, so I accordingly went up to Coeur d'Alene to see Dr. Higgens. That was the nearest place I could go to get a stockholder outside of the state, and most convenient place. I went up to present the matter to Dr. Higgens.

Q. You heard the doctor testify here today, or parts of it? A. Parts of it.

Q. And what is the fact as to whether your approaching Dr. Higgens was in furtherance of the purpose of this stockholders' association?

A. That was exactly the situation. I am quite positive that I told him that I came there on behalf of the committee because we wanted to get a plaintiff from outside of the state.

Q. You wanted to get a plaintiff anyway, whether it was outside or inside?

A. Yes.

Q. When did you first know anything of the

(Deposition of A. P. Bateham.)

pendency in California of a suit brought by Frank A. Garbutt to quiet title in the Log Cabin Mines Company to the purchase contract; that is, the contract that was made originally with Russell Collins and probably one or two others, that was an asset and is now taken to be an asset of the Mutual Gold? Did you know that there was such a suit?

A. A suit by Garbutt?

Q. A suit by the Log Cabin Mines Company, a California corporation, which started a suit to get judgment and decree subsequently by default? Did you know of that during its pendency?

A. No, I didn't know it until some time afterwards.

Q. Some time after it had gone to default, you mean, and judgment rendered?

A. Yes. You or Mr. Woodworth told me about it or showed me some report to that effect. I never knew of it before.

Q. You never knew of it before that? Do you know whether or not a purported copy of the judgment is set up as an exhibit to the Answer of the Mutual Gold in this pending case in which you are testifying? A. No.

Q. You don't know that?

A. No. The Answer, you say?

Q. As a matter of record, there is attached as an exhibit to the Answer of Mutual Gold in this pending case a copy of that judgment, purported to be a copy, and it is pleaded as what lawyers call

(Deposition of A. P. Bateham.)

res judicata, that we are out of court and that the Court ought to go against us in this case. Did you know of that before that was done? A. No, sir.

Mr. Moore: I think that is all.

Cross Examination

By Mr. Weller:

Q. Mr. Bateham, you are the same A. P. Bateham who was one of the plaintiffs along with Dr. E. T. Richter in a suit brought in the spring, I believe, of 1939, against the Mutual Gold, Garbutt, Log Cabin Mines and possibly some others to quiet title to the Mutual Gold property?

A. Yes, sir. I remember signing the complaint as a plaintiff.

Q. Did you employ either of the attorneys in that action? A. Not myself, no.

Q. Who induced you and Dr. Richter to bring that action, Mr. Bateham?

A. Well, I don't know. I think there was—it might have been Mr. Moore, or Mr. Woodworth might have suggested it.

Q. You knew, did you not, that Joe Vance had brought two actions against the Mutual Gold at or about the same time that your action was brought?

A. Yes.

Q. Your action, as a matter of fact, was brought just almost identical in time with that of the second action brought by Mr. Vance, was it not?

(Deposition of A. P. Bateham.)

A. Well, I know it was around there somewhere. I don't know as to either one now.

Q. Did anyone consult with you in regard to the allegations that were made in the complaint in that action brought by you and Dr. Richter against the Mutual Gold and others?

A. Why, I think I consulted with lawyers about it.

Q. Did you ask any lawyers to start that action?

A. I told them I was willing to.

Q. Did you ask them to start it, is the question, Mr. Bateham.

A. I don't think I did.

Q. Do you know whether or not that action brought by you and Dr. Richter was instigated by Joe A. Vance? A. Not that I know of.

Q. Or by Mr. Abel or Mr. Moore representing him?

A. Well, not by Abel or Vance. I know Mr. Moore is a close friend and attorney for myself in some respects and so is Mr. Woodworth, who is retained by our company all of the time, and I may have talked it over with them. I don't think anybody else.

Redirect Examination

By Mr. Moore:

Q. Mr. Bateham, you were quite active, it appears, in this stockholders' protective committee as chairman and so forth?

A. Why, I tried to be.

[Title of District Court and Cause.]

DEPOSITION OF FRANK A. GARBUTT

taken before Rose B. Cordarrens, a Notary Public in and for the County of Los Angeles, State of California, on August 25th, 1939, beginning at the hour of 10 a. m., at the offices of Frank A. Garbutt, Pantages Theatre Building, Los Angeles, California, pursuant to an order of court.

FRANK A. GARBUTT

being first duly sworn, testified as follows:

Direct Examination

By Mr. Hinckle:

Q. Have you had any experience in gold lode mining? A. Yes.

Q. Over how long a period has that experience extended? A. About 52 years.

Q. How old are you? A. Seventy-two.

Q. What training if any did you receive in mining engineering?

A. My father, who was a mining engineer, graduated from Harvard, and he taught me mining engineering.

Q. Was that private instruction?

A. Private instruction.

Q. Did you do any work in the course of that instruction? Did you do any work under him as an engineer, engineering work? A. Yes.

Q. Where was that done?

(Deposition of Frank A. Garbutt.)

A. In Colorado and Southern California.

Q. In what counties in California?

A. San Bernardino County.

Q. What experience have you had in that kind of mining since then?

A. I have been engaged in mining, that kind of mining, and other kinds, off and on for 52 years.

Q. In what localities?

A. In California, in Lower California, Old Mexico, Arizona, Nevada, Utah, New Mexico, Colorado, Canada. That is all that occurs to me at the moment.

Q. In the course of that experience did you do any under ground mining work?

A. I worked under ground as a miner for about three years.

Q. Was that in California?

A. That was mostly in California.

Q. What experience if any have you had with stamp mills?

A. I have run them, repaired them; I have the trade of mill wright; I have examined a good many mills and I have worked as the mill man and as a mill superintendent; I have studied stamp mills as a mining engineer and I of course had to familiarize myself with stamp mills practice of the world. I had a little experience in Colorado.

Q. Is there a stamp mill located on the mining property in Mono County, California, which is described or referred to in the complaint in this case?

A. Yes.

(Deposition of Frank A. Garbutt.)

Q. What changes have you made in the mill, after you took charge of it?

A. We built a bin at the mine, and increased the capacity of the mill bin, which was improperly designed, took out the inclined belt conveyor and put in a flat belt conveyor, a bucket elevator. This was done on the advice of the mill man, Mr. Haley, after consultation with him in regard to that. I went to Mr. Haley to get him to run the mill last winter as I knew no one who would take the job in that climate and under those conditions, and he was represented as being a good man and recommended by Mr. Keily, the former superintendent of the mine and mill. Mr. Haley said he would not go——

Mr. Abel: Object to that as hearsay and not responsive.

A. He said that he would not want to take the job unless conditions were changed and the mill was changed and I told him I would not ask anybody to do that——

Mr. Abel: I object to that as not responsive and immaterial, self serving and hearsay.

A. (Continuing) —to run that old junk pile as it was and with some vehemence he said, "junk pile is right." I told him I did not want to spend much money on it because it was temporary at best, and the purpose in running it was to learn more about the mine so as to select the proper equipment for it, and he then outlined the least

(Deposition of Frank A. Garbutt.)

amount of changes that would have to be made before he would take the job, and after going over it with him I concurred in his recommendations and we made the changes. I bought the material and he made the changes himself.

A. When we could keep the mill running, we crushed, or ground, or milled at the rate of 44 tons per 24 hours. That is the average rate.

Cross Examination

By Mr. Abel:

Q. What relation did you have to Alice Clark Ryan and the Chandis Securities Company, the owners of this mine?

A. Just what do you mean by that question? I don't just exactly get it. I was in no relation to them.

Q. Any business relation?

A. I was their representative negotiating the sale of Log Cabin Mines property to Collins Brothers.

Q. Were you the representative of the company, the Chandis Securities Company, Alice Clark Ryan and N. N. Clark, in reference to the assignment of the contract to Collins?

Q. And the various supplementary contracts?

A. Yes. They advised with me on those matters and usually followed my advice.

Q. Were you the agent in charge of this property?

(Deposition of Frank A. Garbutt.)

A. No. I had no charge of the property.

Q. Just what did you do for your principals, the owners of this Log Cabin mine?

A. They asked me to negotiate the sale of it and advise them in regard thereto and I acted in that advisory capacity without pay. They had both done me some favors and I was trying to show my appreciation.

Q. Did that service continue during the years that the contract was in force, did that relationship of yours continue? A. Yes.

Q. When did you personally come into possession of the Log Cabin mine, so called?

A. I undertook the management as I recall it shortly after my first trip to the property.

Q. For whom?

A. For The Mutual Gold Corporation.

Q. Was the management contract in writing?

A. The contract was a contract that was entered into between the Mutual and myself looking to my advancing some money for them.

Q. When did you commence to advance money under that contract?

A. I think I advanced the first money before I had a contract. I am not certain of that. I advanced them $10,000. Whether that was before or after the contract I don't know. I told them I would find them $10,000 to make that payment with, irrespective of whether we did business or not. They were at that time very much worried.

(Deposition of Frank A. Garbutt.)

Mr. Abel: I object to that as not responsive.

A. It is an explanation of my statement.

A. They were very much worried about a payment of $10,000 due to the owners. They had expected to get the money from Mr. Vance and he had declined to put it up unless they signed a contract to his liking.

A. I told them I would advance this money whether or not they made an agreement, and so far as the payment was concerned they could look around and find somebody to do business with them who would be satisfactory to them and I would help them to do so.

Q. What is the entry entered on August 15th 1938, M. J. Keily, ticket to Seattle $69.35?

A. If you will allow me to tell you I will explain it to you. Keily made up his mind to go on Sunday and he wanted to get off that night so I went down and bought the tickets for him and gave them to him, while he was getting ready to go. It was Sunday and I got the tickets for him.

Q. Did you have any other interest in his going other than just buying the tickets as a friendly accomodation?

A. Yes. I wanted to see him make the deal if he could; that would help out the stockholders of the Mutual Gold Corporation.

Q. Who was he representing at that time?

A. I think he was representing, as near as I

(Deposition of Frank A. Garbutt.)

can tell, I think he was representing Russell Collins and Mr. Ferbert. But, I am not sure.

Q. Was he representing Cecil B. De Mille?

A. At that time we were talking to De Mille, trying to interest him in the property.

Q. Who was talking to De Mille on that subject?

A. I was. Later on Mr. Keily talked to him.

Q. That was about the date of August 17th. Were you trying to buy the Log Cabin Mines at that time, in De Mille's name, or for De Mille?

A. Along about that time we were trying to interest Mr. De Mille in it.

Q. Who is "we"?

A. Myself, and the Log Cabin Mines Company through me.

Q. There wasn't any Log Cabin Mines Company at that time.

A. I mean the Mutual Gold. That is a lapsus linguae. I arranged an appointment between Mr. De Mille and Mr. Keily, and Mr. Keily talked to them about it and so did I.

Q. Did you draft a contract at that time, which was De Mille's offer, about that time?

A. Well, it was not De Mille's offer. It was a tentative proposition. We were trying to agree on it.

Q. Who is the "we" that were trying to agree?

A. Mr. De Mille, myself and the Mutual Gold Corporation.

(Deposition of Frank A. Garbutt.)

Q. At that time the Mutual Gold Corporation knew nothing about it, did they?

A. I told them I was trying to interest a party for them, and who the party was.

Q. Who did you tell and on what date?

A. I don't know; but the person I told them was C. B. De Mille.

Q. Then you did not tell any officer of the Mutual Gold Corporation?

A. I do not know what date it was that I disclosed the identity to them.

Q. When did you make the disclosure and to whom did you make it?

A. I do not recall. I was in contact with Russell Collins and Mr. Grill and I think Mr. Ferbert, so it must have been one of those.

Q. That was before the date Keily went to Seattle?

A. That I don't know. I haven't a good memory for dates. I never try to remember dates.

Q. Do you now observe that your ledger entry on August 17th, that you advanced the money for Keily to go to Seattle?

A. I presume that is correct. I do not confirm or deny it.

Q. Will you please read the entry out of the book? I do not wish you to take my statement for it.

A. They have an entry reading August 15th, M. J. Keily, ticket to Seattle $69.35.

(Deposition of Frank A. Garbutt.)

Q. Were you ever re-imbursed for that advance?

A. I don't know.

Q. If you were re-imbursed by whom were you re-imbursed? A. That I don't know.

Q. Keily at that time had been, off and on, in your service, for 17 years?

A. No, he was not. I testified that he was in my service for 17 years, but after he left it he never came back again.

Q. What years was he in your service?

A. He left my service about six years prior to this time he went to make the contract—prior to this date, about six or seven years ago.

Q. What was Keily's mission to Seattle for which you advanced the ticket money?

A. He went up there I think, at the request of the Mutual Gold Corporation, to try to help them make a deal for the financing of their property, and at that time I had no interest in it, directly or indirectly, and I told them I did not want to make a deal with them.

Q. Who did you tell that to?

A. Russell Collins, and what-ever directors came down here. They were in my office and haunting me for several weeks, trying to get somebody to help them or go in with them and I told them I didn't want to.

Q. What weeks were they?

A. I don't remember. It was immediately prior to the time Keily went to Seattle. The last thing

(Deposition of Frank A. Garbutt.)

I wanted was any interest in the Log Cabin mine.

Q. Can you give us the names of any of the proposed purchasers of the Log Cabin Mine?

A. The only two I ever talked to about it—there were three. Cecil B. De Mille, and I talked to Hal Roach about it, but we never got to the point of making a contract; I also talked with Harry Chandler about it. They wanted to interest him and I got him in contact with Keily and we urged him to do something for Mutual Gold and he declined and said he did not want any part of it.

Q. When was that?

A. It was about the same time.

Q. Was he informed of the status of the property?

A. He was informed of everything about it I knew. Irrespective of that, he said that he was a seller, not a buyer, and did not want anything to do with mining. I got him to come to my office to discuss the matter with Mr. Keily. He came here as a favor to me, and I urged Mr. Chandler to come to the rescue of Mutual Gold Corporation, and try to save them from Mr. Vance, but, he said he was not interested in going into any mining ventures.

Q. When was your proposal drafted whereby you were to take over the Log Cabin?

A. I could not state the date but that occurred in this way——

Q. I am asking you as to the date.

(Deposition of Frank A. Garbutt.)

A. I don't know the date.

Q. Was it before or after you sent out the cancellation notice?

A. I don't know. I want to explain my answer because I want to explain the circumstances. The circumstances were these. Mutual Gold Corporation had urged me on numerous occasions to go with them and help them out and I had declined. I was at that time the representative of the owner and I had a primary duty to perform them. The Mutual Gold Corporation directors and officials informed me they were being driven into a contract with Mr. Vance, and that they did not want to go into it. I told them I would help them to the best of my ability to find a party who would go in with them and would help them to finance themselves. But they kept coming to me and urging me to prepare a contract and they said, "we are lost if we don't have some kind of a concrete proposition to present to our stockholders meeting that will be better than the Vance proposition." And I said, "well, I don't want any interest in your company. I don't want to go back into the mining business but I will yield to your urgings and make you a contract providing I can cancel it at any time I please without any personal liability. If that will serve your purpose I will then join with you in trying to find someone for you that will take my place and go on with it. That is the reason that particular contract was drawn.

(Deposition of Frank A. Garbutt.)

Q. When were those urgings on the numerous occasions of which you speak?

A. They extended up to the time that contract was drawn and for a number of weeks previous thereto. If I was guessing I would say six or seven weeks.

Q. Before what date?

A. Before the date that contract was entered into.

Q. You mean your contract?

A. The contract between Mutual Gold and me.

Q. That was on September the 2nd, wasn't it?

A. I don't remember.

Q. Have you got the contract? A. No.

Q. Can you refer to something and fix the date?

A. I don't know how I can at this moment, but that was the first contract that was made between Mutual Gold Corporation and myself.

Q. Did you talk to the owners about sending out the cancellation letter which for the purpose of this case I will assume is dated August 25th, 1938?

The Witness: I talked about it on several occasions but I do not recall whether I talked with them about it at the time it was sent out or not. We had numerous conversations about the conditions and what led to it.

Q. Would you then say you did or did not specifically talk to the owners Alice Clark Ryan and the Chandis Securities Company about sending

(Deposition of Frank A. Garbutt.)

out the cancellation letter dated August 25th, 1938?

A. I must have talked to them about it, although I never talked to the Chandis Securities Company. I talked with Harry Chandler, whom I contacted, and I told him, at what time I am not certain, that I was sending the letter out and I got their approval thereto.

Q. Did you tell them at that time you were negotiating to have the contract assigned to you?

A. I do not know whether I did or not.

Q. Did they know about it?

A. As to the dates—of course they knew about it, but as to when they knew about it I do not know.

Q. Did they object? A. To what?

Q. To your dealing, to get an assignment of the contract yourself?

A. They did, and they terminated my employment with them. They terminated my authority to represent them.

Q. Was that in writing? A. I think so.

Q. After that did you draft a letter for Mrs. Ryan to send to Mr. Vance?

A. Not that I know of. I did discuss with her some of the letters she sent to Mr. Vance.

Q. That was after you had ceased to represent her?

A. I do not know whether it was after or before.

Q. What did you discuss with her?

(Deposition of Frank A. Garbutt.)

A. They questioned me about the property and I told them what I thought. I have no definite recollection of that. That is no definite recollection now.

Q. When did you commence operating the mine in question?

A. For myself, or for the Log Cabin?

Q. Commence to operate it? When did you commence to operate it?

A. In the early fall of 1938.

Q. Can you fix the date?

A. No, only by entries in the books.

Q. You have a payroll account?

A. The payroll account will show when the payments were made, when the service was performed by the employes.

Q. Have you any record of that?

A. I can fix the date.

Q. Let's have the date you commenced to employ men in the operation of this mill. Not the date you paid them, but the date you employed them.

A. You can tell the period it is for.

Q. You have a report from the mine on that?

A. No. They didn't report for quite a while. They were very poor correspondents.

Mr. Carter: September the 10th to 30th.

Q. Will you please produce your record to show who were employed?

(Deposition of Frank A. Garbutt.)

Mr. Hinckle: Can you give it to him with the statement?

Mr. Carter: M. F. Haley and Russell Collins and J. R. Sturgeon.

Q. Assuming that you issued a letter under date of August 28th, 1938, to cancel the contract between the old owners, then held by Mutual Gold Corporation, and assuming further that August 27th your proposal to Mutual Gold Corporation was accepted, would you say that the contract of September 2nd, 1938, a copy of which is Exhibit D, represented your first agreement with Mutual Gold?

A. I do not get the force of that question. Do you mean did this represent our—yes, naturally.

Q. Do you recall a meeting in this office of yours on August 27th?

A. I do not know the date. Meeting with whom?

Q. J. A. Vance, Lloyd Vance, myself and Mr. Grill. Do you recall that meeting? A. Yes.

Q. At that time did you have a deed from the Mutual Gold? A. I don't know.

Q. When did you receive a deed from Mutual Gold to the mine here? A. I do not know.

Q. Have you the deed?

A. I think it was sent up to the Recorder to be certified, to get certified copies to go to the attorneys in this case for the trial of this case.

Q. Do you say that you do not have the original, or that you do have?

A. I do not think that I have the original.

(Deposition of Frank A. Garbutt.)

Q. Have you a copy? A. I may have.

Q. What consideration if any did you pay for the deed to the mining property here involved?

A. Well, the deed was made to me as I recall, as one to hold in trust, to transfer to the new corporation to be formed, when formed, and as security for the money I had advanced and was to advance.

Q. Do you say that those matters of that trust feature, or the advancing of money are mentioned in the deed? A. That I don't know.

Q. Will you swear that it was?

A. I don't know. The deed will speak for itself in that regard. I will say however, that about the time the deed was made and delivered that that was our understanding, that it was to be made and held in trust for that purpose.

Q. Was that understanding in writing?

A. I do not know.

Q. With whom did you have that understanding?

A. With the directors of the Mutual Gold, with whom I dealt.

Q. What directors?

A. There may have been several. Mr. Grill, Mr. Ferbert and Collins.

Q. When did you have that understanding?

A. At the time the deed was drawn and delivered.

Mr. Abel: Now, was there any change in the possession of this mine between the date of Sep-

(Deposition of Frank A. Garbutt.)

tember 2nd, 1938, and the date of November 1st, 1938?

A. To this extent: where previously I was operating for myself under the date of September 2nd and 22nd, I then operated for the Mutual Gold corporation and was carrying on the operation for them, as an accomodation, and advancing money for those things that they agreed should be done. In the first instance I was in possession acting under a contract, and in the second instance I was acting as representative under their instructions.

Q. From whom did you get the instructions?

A. From the Mutual Gold.

Q. Were those in writing? A. I think not.

Q. What person gave you the instructions?

A. It would be either Mr. Grill, Mr. Ferbert, or Mr. Stiegler.

Q. Neither of them were present personally with you?

A. I don't know. Mr. Ferbert was down here quite often.

Q. When?

A. He was down here for two or three months. I don't know the dates. He would come to my office occasionally.

Q. How did you carry your accounts with the state of California, your payroll reports to the state of California?

A. I would have to ask Mr. Carter about that but I think they were carried in the name of

(Deposition of Frank A. Garbutt.)

Mutual Gold. We carried them for a time in my name and I think it was changed after that to Mutual Gold.

Q. Do you testify to that from personal recollection?

A. That is my recollection. I can confirm it by asking Mr. Carter.

Q. Have you a record of the payments that you made to the State of California or any of its departments?

A. That will all come in the statement you are to get.

Q. In reference to the payroll, the old age insurance, unemployment insurance, etc.?

A. Yes. He may know from memory or he can look it up, which ever you prefer. My recollection is those payments were made in my name and then Mutual Gold and then later on by the Log Cabin, when the property was transferred to it, and the later contract went into effect.

Q. How many changes of management or possession has there been of this mining property since September the 1st 1938?

A. I first managed it as I recall for the Mutual, then under my contract with them, as it called upon me to do, then again for the Mutual then again for the Log Cabin. That is my recollection.

Q. When did you commence to manage the mining property here involved for the Mutual?

(Deposition of Frank A. Garbutt.)

A. That would be forthwith upon my withdrawal from the contract of September the 2nd.

Q. Didn't you start to spend money on this property before the contract of the 2nd of September, even?

A. I may have. I don't think so.

Q. Didn't you order a power line installed at an expense of $11,000 before you had a contract?

A. That was done for the Mutual. I went out on a limb and did that. They said it would be all right to do it, but I had no contract. I was just taking a chance.

Q. Then you did incur an obligation for at least $11,000 before you had a contract at all?

A. Yes. The situation was this. They were in desperate straights because if they did not work through the winter they would lose another year, and whoever operates the property had to have a power line, and at that time it was contemplated I would find them some party who would go in with them, and when I saw what kind of a mess it was, with Vance's lawsuit and litigation, I could not go to anybody and ask them to go in on it, because I could not recommend it.

Q. Did you advance that $11,000 or incur an obligation of $11,000 for a power line while you were operating for the owners on an existing contract that had been terminated and forfeited?

A. That I don't know. I advanced the money at

(Deposition of Frank A. Garbutt.)

that time or became obligated for it, for the Mutual, yes.

Q. When was the Mutual Gold relieved of the forfeiture notice of August the 25th?

A. I don't remember. It was done sometime later.

Q. How much later?

A. After your visit down here with Vance.

Q. Was it as much as five or six weeks later?

A. It may have been. I don't know.

Q. Then while the sword of forfeiture, the letter of August the 25th, was hanging over the head of Mutual, you, without any contract advanced $11,000 or incurred an obligation of $11,000 for Mutual?

A. Yes, and I have done the same thing with hundreds of others in other cases.

Q. Did you know that the forfeiture notice of August the 25th would not be insisted upon then?

A. No.

Q. Were you at that time assuming that it was effective legally, and terminated the contract which Mutual had with the owners?

A. If you will make the time more definite—I think the contract was forfeited and I think it was terminated.

Q. When was it given new life?

A. I don't know the date, but you at least have the notice, when the notice of termination was withdrawn.

(Deposition of Frank A. Garbutt.)

Q. Was there a notice of withdrawal of the forfeiture? A. Yes.

Q. Who sent it out?

A. I think Mr. Chandler and Mrs. Ryan.

Q. To whom? A. To The Mutual Gold.

Q. When? A. I don't know the date.

Q. How did you become familiar with that?

A. They told and Mutual Gold told me.

Q. When? A. I don't know.

Q. What persons told you that?

A. Mr. Grill.

Q. Did you prepare that notice?

A. I don't know.

Q. Do you now deny that you did prepare that notice?

A. I can't recall. I know at that time they relieved me of responsibility.

Q. Was that the time they discharged you as agent? A. About that time.

Q. Did the owners or Mrs. Alice Clark Ryan send you a notice, a letter which she sent to Vance?

A. Yes.

Q. Was that about the time the letter was sent?

A. It was about that time. I do not recall the chronology of it.

Q. You are handed a paper, a copy of a letter containing three sheets dated October 23rd, 1938, and I will ask you to state whether or not she was supplied with a copy of that letter or the original, purporting to be written by Alice Clark Ryan?

(Deposition of Frank A. Garbutt.)

A. Yes, I have seen that.

Q. When?

A. I imagine about the time it was written.

Q. Did you write it? A. No.

Q. Did you compose it?

A. No. I talked with Mrs. Ryan about it.

Q. Was it then written following your conversation? A. I imagine so.

Q. Did you sponsor the letter in any way?

A. I approved of it.

Mr. Abel: I offer in evidence a copy of the letter and will offer the original at a later date. It will be Exhibit G. You are now shown a letter headed Progress Report, dated September 23rd, 1938. Did you issue that instrument?

A. I wrote this, yes. Assuming it is a correct copy which I have no doubt of. This refreshes my mind. At that time I did not obligate myself for the $11,000 but for $500, which was the preliminary survey of the power company.

Q. In these several progress reports, between September 23rd and November 22nd, and January 8th, I notice that you make no reference or mention at all to the various shifts that had been made in these contracts. If that be so, why was it?

A. It was none of my business. I had no direct contact with the stockholders of Mutual Gold Corporation. Mutual Gold Corporation itself was fully advised of everything that occurred, and I made these reports at the request or desire of Mutual

(Deposition of Frank A. Garbutt.)

Gold, telling them things which they did not know, or if they did know, they did not know officially.

Q. Going back to the value of this property, you say you have spent how much on this property?

A. I would have to ask.

Q. In round figures?

A. I would say $95,000 maybe.

Q. $95,000? A. Probably.

Q. You consider that a valuable mine?

A. I do not know. I never told anybody I thought so. With two exceptions.

Q. You claim to have been an experienced and skilled mining engineer of over fifty years experience? A. Yes.

Q. Was it your judgment that this was a valuable mine? A. I do not know.

Q. Did you think so?

A. I thought it had possibilities. But, so far as I know I don't know what possibilities. I did not know then and I do not know now.

Q. Do you think it is valueless?

A. No, I do not think it is valueless, but I think a person can lose a lot of money on it.

Q. Have you had any mining engineer pass on this property? A. No.

Q. Not any?

A. Well, I got the so-called reports of Mr. Cole, and Mr. Keily, but they did not pass on it for me.

Q. Mr. Cole's report was brought to your atten-

(Deposition of Frank A. Garbutt.)

tion shortly before you got the contract of September 2nd?

A. Some time before that I saw it, but I did not take too much stock in that report. It had too many inconsistencies in it.

Q. But according to that report, that property was worth, with ore in sight, nearly two million dollars, according to the report?

A. As I recall it, it was a million and a quarter or a million and a half but whatever it was it was silly.

Q. Without making an examination yourself, you made a contract under which you were to control it?

A. That I would operate it. I have bought prospects before for cash, and spent money on them lots of times.

Q. When did you last spend money on this prospect? A. I am doing it today.

Q. Are you doing it as the owner?

A. I am doing it under my contract with Mutual Gold.

Q. How many times did Grill see you?

A. I don't know.

Q. Was Mr. Grill in your personal service?

A. No.

Q. Did you advance him any more than the $150?

A. The $150 was money I loaned the Mutual Gold Corporation. They wanted him down here

(Deposition of Frank A. Garbutt.)

and could not pay his way. I told them I thought he ought to be here and I told them I would advance the money and they borrowed it for that purpose.

Q. Did Mutual Gold ever get the money?

A. I paid him the check and charged Mutual Gold with it.

Q. You charged Mutual Gold with it?

A. Yes. I handed him the check myself, in the office, or mailed it to him.

Q. You took possession of Mutual Gold Corporation on or about September 2nd, 1938?

A. I do not recall the dates.

Q. You have been in physical possession of it ever since?

A. I have never been in physical possession since.

Q. You or your agents and those acting for you have at all times since had possession?

A. I employed the people who have been in actual possession during a considerable portion of the time.

Q. And you have paid them, at all times since September 2nd?

A. Part of the time personally; part of the time Log Cabin and Mutual.

Q. In all instances the money came from you?

A. Yes.

Q. You decided who should be employed and

(Deposition of Frank A. Garbutt.)

who should be discharged and how much they should receive, at all times since September 2nd?

A. I left the details of employment to the heads of the various departments.

Q. You selected the heads of departments?

A. Yes.

Q. And such interest, if any, that you received, was received by the deed of September 2nd, 1938, which was recorded November 7th, 1938, and that interest you have not reconveyed?

A. Oh yes I have.

Q. To whom?

A. To the Log Cabin Mines, on the order of Mutual Gold.

Q. Has the deed been recorded?

A. Yes.

Q. Are you sure about that? A. Yes.

Q. Then you are not retaining title for security for advances made by you? A. No.

Q. To whom did you execute and deliver the reconveyance?

A. To the Log Cabin Mines company.

Q. What person received the instrument?

A. Mr. Hinckle, I believe.

Q. He is your personal attorney?

A. He is also attorney for the Log Cabin Mines Company and I think he recorded the deed.

Q. The deed of September 2nd reached your possession on or about that date?

A. I don't know. In due course, anyway.

(Deposition of Frank A. Garbutt.)

Q. How do you explain that it was not recorded until November 7th, 1938?

A. I don't explain it.

Q. If it was withheld or not filed for recording until November 7th have you any explanation why it was not done? A. No.

Q. If it was recorded November 7th, or filed November 7th, you will note that was after the abrogation of the contract on which it depended?

A. We had a new agreement after that was abrogated in which I was to hold this for security for the money I had advanced and was to advance. That became the only security I had and about that time I recorded it. That agreement came within two days after the cancellation of the contract of September 2nd and 22nd.

[Title of District Court and Cause.]

DEPOSITION OF J. A. VANCE

J. A. Vance, being first duly sworn to testify the truth, the whole truth and nothing but the truth, deposed and said as follows:

Direct Examination

By Mr. Grill:

Q. Please state your name.

A. J. A. Vance.

Q. And what is your business, Mr. Vance?

A. Well, I have been in the lumber business.

(Deposition of J. A. Vance.)

Q. Are you retired at the present time?

A. Yes.

Q. What was your previous business, Mr. Vance?

A. Previous to the lumber business?

Q. No, what has your business been in the past, lumbering business? A. Lumbering business.

Q. For about how many years?

A. Oh, about thirty years.

Q. And that has been your primary business during your lifetime, has it? A. Yes.

Q. Were you one of the incorporators of the Mutual Gold Corporation? A. No.

Q. Were you connected with it at the time of the incorporation?

A. Well, I was connected with it shortly after the incorporation.

Q. Were you connected with it at the time that it acquired by contract or was acquiring by contract the Log Cabin Claims? A. No.

Q. The contract was made and transferred to the Mutual Gold before you became connected with the Mutual Gold Corporation?

A. At about that time.

Q. And did you become a director of the Mutual Gold Corporation about that time?

A. I think so.

Q. And continued as director up until about what date? Just give the year, that will be all right, Mr. Vance. A. '37, I think.

(Deposition of J. A. Vance.)

Q. I think it was—— A. Or '38.

Q. It was '37 or '38, anyway.

Mr. Moore: It will appear in the record, I take it.

Mr. Grill: I guess that is correct, yes.

Q. (By Mr. Grill) And were you likewise an officer of the corporation during substantially the same period of time?

Mr. Moore: Do you mean beginning at that time?

Mr. Grill: Yes. Beginning at the time you came into the corporation.

A. Yes, I think I was.

Q. You were vice-president for quite a considerable period of time? A. Yes.

Q. Then what occurred in 1936, the latter part of 1936?

A. Well, I had a contract with the Mutual Gold for to put the thing into production.

Q. How much money was raised at that time, if you recall?

A. $30,000, of which a good part of it went to the office and pipe lines,—for frozen pipe lines.

Q. Do you recall of the $30,000, Mr. Vance, how much went to the office?

Mr. Moore: All that line of testimony, and that question, is objected to as irrelevant and immaterial to any issue in this case.

(Question repeated by reporter.)

A. Well, there was something like $2,800 and $1,400,—there was about $8,000,—I don't remember the exact amount.

(Deposition of J. A. Vance.)

Q. Well, just approximately to the best of your recollection?

A. About eight thousand and some dollars that was spent that way,—eight or nine thousand dollars, I don't know.

Q. And some $22,000 expended on the property?

A. Yes.

Q. And do you recall how that was expended?

Mr. Moore: That question is objected to as too general and irrelevant and immaterial.

Q. (By Mr. Grill) Will you please state to the best of your recollection how the money was spent on the property?

A. Well, it was spent in fixing up the mill and developing ore.

Q. I will ask you whether or not you advanced any sums in addition to the $30,000?

A. Yes.

Mr. Moore: Objected to as irrelevant, and immaterial, all that line of testimony, as to moneys expended by Mr. Vance or anybody else on the property,—that is all objected to on the same ground.

Q. (By Mr. Grill) Do you recall the amount; if so, just state it.

A. Well, it was $8,000, and then there was about a thousand dollars or nine hundred, or a thousand dollars that was paid for labor when we shut down.

Q. And did you advance $10,000 to the owners too? A. Yes.

(Deposition of J. A. Vance.)

Q. And did this additional eight or nine thousand dollars which you mentioned go into the putting of the mill in operation?

A. Yes, and blocking out ore.

Q. Do you know how much was spent in blocking out ore?

A. Well, there was about $8,000.

Q. Spent in blocking out ore? A. Yes.

Q. Was that during the period you were there, Mr. Vance, or afterwards?

A. That was after I left.

Q. Was the $8,000 used after you left, or before?

A. No, that was used before I left.

Q. And when did you leave?

A. About December 12th, I think.

Q. So will you now say that the $8,000 was used for blocking out ore from the time you went on the property until the time you left in December?

A. Yes, it was used in blocking out ore or fixing up the mill and things like that.

Q. So that there was approximately $30,000 used in putting the mill in operation?

A. Yes.

Q. And connecting up the shaft——

A. And blocking out $1,650,000 worth of ore.

Q. How do you arrive at that figure, Mr. Vance?

A. That estimate,—I think Russell Collins claimed that there was over $2,000,000 worth of ore.

(Deposition of J. A. Vance.)

Q. Did you make that estimate yourself?

A. No.

Q. Then this million, six hundred thousand dollars worth of ore is then an estimate someone else made you? A. Yes.

Q. That was at the time you left, Mr. Vance, in December?

A. No, in the springtime, there was that much ore blocked out.

Q. Was that in the year of 1939?

A. '38,—the spring of '38, there was that much ore blocked out.

Q. Did you ever attempt to compute it yourself?

A. No, I didn't.

Q. Do you know how many feet of tunnels were there at that time?

A. About 650 feet, I should think, of tunnel on the lower level, and,—oh, there was a lot more tunnel than that.

Q. On various levels?

A. There was three levels. I don't know just how much there was. There must have been about fifteen hundred feet of tunnel altogether.

Q. Well, you didn't attempt to compute the ore yourself? A. No.

Q. Mr. Vance, can you tell us what your costs were per ton for milling the ore in the stamp mill?

A. No, I can't tell you now.

Q. Can you state approximately?

A. No, I can't.

(Deposition of J. A. Vance.)

Q. Can you state or will you state offhand the cost per ton of getting the ore to the mill?

A. No.

Q. You can't now state?

A. No, I can't.

Q. Can you state what your average recovery per ton was during the period of operation in which you were in there, August 17, 1937 to April 22, 1938?

Mr. Moore: You mean from memory?

Mr. Grill: Yes, to the best of his recollection.

A. Well, I don't know what the average was, but we paid expenses all the time.

Q. Can you state what your net profit per ton was, if you had a net profit?

A. I don't think there was any net profit to amount to anything at all.

Q. Was there any reason for that, Mr. Vance, —can you state any reason?

A. Well, you see we was not allowed to mill any ore except what we took out of the tunnels, according to the contract.

Q. Wasn't there some stoping done during that period? A. No.

Q. No stoping at all during that period?

A. Well, not any to amount to anything. I don't know just what there was, but there wasn't any stoping to amount to anything.

Q. Then I will ask you whether or not you mean that all of the ore that was run through the mill

(Deposition of J. A. Vance.)

came from the development work from the running of the tunnels? A. Yes.

Q. And not from any stoping, to the best of your recollection? A. Yes.

Q. And that, in your opinion, is the reason that there was no profit made? A. Yes.

Q. I will ask you whether or not in your report, gotten out in the latter part of December, 1937, of the Mutual Gold, giving activities of the company from September, 1937, to December 12, 1937, you did not state that the costs of mining and milling were excessive?

Mr. Moore: That is objected to as irrelevant, immaterial and not within the issues.

A. I don't remember anything about it.

Q. I will ask you whether or not in your opinion, in view of your experience with the property, you could have operated the stamp mill at a profit?

Mr. Moore: I object to that as the witness has not been qualified as an expert. He testified his whole life has been spent in the lumber business.

A. Well, if we had been allowed to stope, why we could have made a profit.

Q. How much of a profit, in your opinion?

Mr. Moore: The same objection.

A. Well, we could not have made the profit that we should have made if we had had a cyanide system in there, which Mr. Garbutt ran the mill for a year after we gave it up,—after I had given it

(Deposition of J. A. Vance.)

up, and he didn't use any cyanide system and it seemed to work all right.

Q. Did you lose very much time in repairs of the plant during your operation? A. No.

Q. Do you now recall what percentage of recovery of gold you had in your operation?

A. No, I don't remember what percentage there was. I haven't got that stuff. I had a book with that all in and somebody stole my book up at the hotel one time.

Q. How many tons of ore did you run through the mill during that period, or the average per day, approximately?

A. Oh, it is about forty ton, I think.

Q. You averaged, you believe, about forty tons during the period of your operation?

A. I think so.

Q. Do you know how much the loss was in the tailings?

A. Well, it was supposed to be about five dollars a ton.

Q. And how did you arrive at that figure?

A. Well, that was the assay of the tailings, I think.

Q. How many assays did you take during the period of your operation, or how many assays were taken during the period of your operation, if you know?

A. Well, there wasn't very many.

(Deposition of J. A. Vance.)

Q. You didn't have an assayer on the property?

A. No.

Q. Was the mill shut down in 1938?

A. Yes, it was shut down April 22nd,—it was shut down from then until September, I think it was, when Garbutt started it up.

Q. Well, it was shut down,—you don't know the date that Garbutt started?

A. I don't know what date he started——

Q. Well, that is not necessary. Did you visit the property during May or June of 1938?

A. Yes.

Q. Who accompanied you at that time?

A. Mr. Cole and Lloyd Vance.

Q. Who was Mr. Cole?

A. Mr. Cole was a mining engineer.

Q. Did he make an inspection of the property and an examination at that time?

A. Yes, sir.

Q. Was that made under your supervision?

A. Yes.

Q. Do you recall how many samples Mr. Cole took at that time?

A. Oh, about twenty-five or thirty. I don't know just how many.

Q. Is that your reecollection, twenty-five or thirty? A. Yes.

Q. How long did he remain at the property?

A. I don't know how long he was there, a week or so.

(Deposition of J. A. Vance.)

Q. Did Mr. Cole spend a week or so on the property examining it? A. Yes.

Q. Can you now, Mr. Vance, recollect and state approximately how many tons of ore were supposed to be available or blocked out at that time?

A. Well, I can't tell you exactly. I don't know. I think there was 125,000 tons. That is just a guess on my part.

Q. That is of gold ore? A. Yes.

Q. And can you make any estimate as to the recoverable gold content of the block at that time,—the 125,000 tons? A. No, I could not.

Q. Do you know how much the ore ran, five or ten or fifteen dollars a ton?

A. It ran all the way from five to twelve dollars I think,—twelve or fifteen dollars. About five to fifteen dollars it ran.

Q. And can you give approximately the average,—your estimate?

A. It averaged about eight dollars, I think. And then there was about five dollars of that that went in the tailings,—or there was five dollars besides that that went in the tailings.

Q. Oh, you mean eight dollars of recoverable values then? A. Yes.

Q. And making an average then of about $13 of gold content? A. Yes.

Q. Is your recollection sufficiently refreshed, Mr. Vance, to say approximately what your mining and milling costs would be per ton? A. No.

(Deposition of J. A. Vance.)

Q. Was it six or seven or eight dollars?

A. Somewhere close between six and eight dollars. We ran for two or three weeks there without putting any ore through at all, you might say. We were just developing and running tunnels and things that were necessary to be done.

Q. And had a certain amount of waste?

A. Yes. And it was forty to sixty percent waste in all of that.

Q. Forty to sixty percent waste? A. Yes.

Q. How much was the average of your waste through your operations?

A. Well, I don't know.

Q. You don't know what the average or approximate average would be? A. No.

Q. Do you recall, Mr. Vance, the total amount you received or the company received during your operation for gold sold to the mint or sold to the United States? A. No, I can't remember.

Q. You don't know approximately?

A. No, I don't.

Q. It is your recollection that you paid expenses?

A. We paid expenses after we got started and got the thing going once.

Q. And that continued up until April 22, 1938?

A. Yes.

Q. Did you submit a plan to the Mutual Gold or to its Board of Directors in 1938 for the construction of a new mill?

(Deposition of J. A. Vance.)

A. No, I don't think there was any plan.

Q. Well, then, did you submit an offer of some character to the Mutual Gold Corporation?

Mr. Moore: Objected to as irrelevant and incompetent.

Q. That is for the construction of a new mill?

A. Yes, we figured on a new mill.

Q. And what character of mill, Mr. Vance?

A. Cyanide,—a ball mill and a cyanide plant.

Q. Of what capacity?

A. Oh, it was about 250 tons; supposed to be guaranteed 100 tons.

Q. And what was the occasion for the recommendation or the offer to Mutual Gold of putting another or larger mill on the property?

A. Well, it would stand a bigger mill and it was necessary to have a cyanide plant in order to make the recovery. We could have bought a mill at that time with a cyanide plant and everything for $20,000.

Q. Do you know the character of the cyanide plant?

A. Well, I don't know,—just cyanide, that is all.

Q. You don't know the kind of a plant it was at this time?

A. No. Just tanks and,—I don't know whether there is any difference in cyanide plants or not.

Q. About when was that offer made, Mr. Vance? During what month or months, if you recall?

(Deposition of J. A. Vance.)

A. About the 6th of August, I think.

Q. 1938? A. Yes.

Q. Now, do you now recall the terms of your offer? If you do, just state them to the best of your recollection.

A. It was not me that made the offer; it was my son.

Q. Were you interested in the offer?

A. Well, yes, I was interested in order to get my money out of it.

Q. Well, were you planning to put in some money yourself with your son? A. Yes.

Q. Well, that was really the joint offer of yourself and your son, wasn't it, made in his name?

A. Well, yes.

Q. (By Mr. Grill) A meeting of stockholders which you attended was held in September,—or August 6, 1938. You attended that meeting, didn't you, Mr. Vance? A. Yes.

Q. And do you know the financial condition of Mutual Gold, or did you know it at that time?

A. Yes, sure.

Q. What was its condition?

A. Well, they didn't owe anything, only on the property.

Q. Did they owe you anything?

A. They owed me eighteen or nineteen thousand dollars, something like that.

Q. Did they owe any other people?

(Deposition of J. A. Vance.)

A. Well, I understood that they owed Ferbert and Steigler a little bit. And they owed Haley I think $119.

Q. Did they owe Mr. Sturgeon anything at that time? A. Well, I think so.

Q. Was the company in any condition to pay its obligations at that time, during August and September, 1938?

A. Not in September. They were in August.

Q. They were in August?

A. I would have paid them myself.

Q. You mean under your new deal,—under your plan? A. Yes.

Q. Or the offer that your son submitted?

A. Yes.

Q. And did the company have any money to pay them at that time? A. No, I don't think so.

Q. (By Mr. Grill) When did the payment fall due to the owners of the property from the Mutual in 1938? A. November 1st.

Q. 1938? A. Yes.

Q. Did the Mutual have the money in August and September, 1938, to make that payment?

A. No, I don't think they did.

Q. Do you know of any way that the Mutual could have raised the money?

Mr. Moore: Same objection as immaterial and irrelevant.

A. Yes.

Mr. Moore: And asking for a conclusion.

(Deposition of J. A. Vance.)

A. I know a way they could have raised the money—if they had give us a contract for to put in the mill, we would have paid that off and we would have had,—we would have paid off the owners and paid ourselves up and had about $120,000 in the bank at this time.

Q. Mr. Vance, I will ask you whether or not at the time of the erection of the stamp mill you were the manager or acting as the manager of the Mutual Gold Corporation? A. No, sir.

Q. Did you at any time act as manager except during the period that you had the contract to act as manager? A. That is all.

Q. Are you acquainted with all of the plaintiffs in this suit, Helen M. Southerland, Charles W. Southerland, Helen Maude Lorenz, M. I. Higgens and Maybelle Higgens?

A. Am I acquainted with them?

Q. Yes, do you know these plaintiffs?

A. Yes, I know all of them.

Q. Did you ever solicit Helen M. Southerland and Charles W. Southerland to become plaintiffs in this action?

Mr. Moore: Objected to as irrelevant and immaterial to any issue in this case.

A. Well, I wired Mrs. Southerland and asked her if she would, and she came back and said, "Yes."

Q. I will ask you whether or not you sent a telegram containing that language to Doctor and Helen

(Deposition of J. A. Vance.)

M. Southerland, 3692 West Marine Drive, Vancouver, B. C.? A. I think so.

Q. And did you receive a reply?

A. Yes, I received a reply, but I don't know what it was now.

Q. Was it favorable or unfavorable?

A. It was favorable.

Q. I will ask you whether you sent a wire containing this language, under date of October 31, 1939, from Los Angeles, California, to Helen M. Southerland and Charles W. Southerland: "Re tel, please advise your status as citizens of Canada. Stop. This is because citizens of Washington cannot act as plaintiffs. Specific information needed as to naturalization. Wire collect via Western Union. Thanks, J. A. Vance."

Mr. Moore: I object to that as irrelevant and immaterial and not the best evidence.

A. I don't know. I don't know whether I ever sent that or not. I suppose I did.

Q. (By Mr. Grill) Mr. Vance, what attorney did you employ in this suit?

Mr. Moore: That is immaterial,—just a moment,—whether he employed any attorneys or not or who may have been his attorneys.

A. I employed W. H. Abel, and Mr. Moore.

Q. And did you employ Mr. Anderson in Los Angeles? A. No, Mr. Abel employed him.

Q. Do you know of any stockholder of the Mu-

(Deposition of J. A. Vance.)

tual who has contributed to the expense of this litigation outside of yourself?

Mr. Moore: That is irrelevant and immaterial. This is a lawsuit for the use and benefit of the Mutual Gold, and it, in legal contemplation, is the plaintiff.

A. Oh, yes, several,—well, not several, but there has been a few of them.

Q. Will you give us their names, Mr. Vance?

Mr. Moore: Same objection.

A. Louisa Woodward.

Q. How much did she advance?

A. I don't know.

Q. And who else? A. Walter Pebbles.

Q. Do you know how much he contributed?

A. No.

Q. To whom did he make his contribution, if you know?

A. Well, I guess they made it direct to Mr. Abel.

Q. Do you recall anyone else?

A. No, not at the present time.

Q. Did you ever write any letters relative to this litigation to either Helen M. Southerland or Charles W. Southerland or any of the other plaintiffs that you now recall relative to this suit?

Mr. Moore: Objected to as irrelevant, immaterial and no bearing on this case or the issues thereof. A. I don't recall any.

Q. I will ask you whether or not you at any time ever wrote Mrs. Helen M. Southerland, the

(Deposition of J. A. Vance.)

plaintiff, a letter in which you agreed to pay all costs if she would not withdraw as a plaintiff, and pay her $1 a share on her stock if you were successful in the litigation?

Mr. Moore: Same objection.

A. I don't think so.

Q. Would you say that you didn't

A. I don't think so.

Q. Did you ever visit her at Vancouver after the suit had been brought? A. Yes.

Q. Do you recall what time that was?

A. No, I don't

Q. Did you have any discussion relative to the suit? A. There was a little.

Q. Will you just state what the conversation was?

Mr. Moore: This all goes in under objection, I understand?

Mr. Grill: Yes, that is understood.

A. I don't know what it was now.

Q. Didn't you at that time promise to take care of all of the cost and expenses of the litigation?

A. I know I said that if we won the suit, why I would guarantee her $1 a share for her stock.

Q. And you would pay all the costs of the litigation? A. Yes.

Q. I mean as far as the Southerlands were concerned.

A. As far as the settlements were concerned?

(Deposition of J. A. Vance.)

Q. As far as the Southerlands were concerned, —as far as they were concerned? A. Yes.

Q. And did you make a trip and meet Helen Maude Lorenz with reference to becoming a plaintiff in this suit? A. No.

Q. Did you send a wire to her?

A. I called her up on the telephone.

Q. And that was agreeable to her? A. Yes.

Q. And did you likewise promise her to take care of the expenses as far as she was concerned, and costs of the suit and say she would be held harmless in costs or expenses?

A. Oh, I think so.

Q. Do you know whether or not a copy of the complaint in this case was sent to either Helen Southerland, Charles W. Southerland or Helen Maude Lorenz? A. I think it was.

Q. You think a copy of it was sent?

A. Yes.

Q. Did you send it?

A. Oh, I don't remember now. But I don't—I think I took a copy of it up there with me.

Q. Do you mean to Vancouver? A. Yes.

Q. Did the Southerlands ever want to withdraw from this suit? A. I don't know.

Q. What was the occasion of your visit to Vancouver to see them?

A. Well, Russell Collins and a fellow by the name of Nelson had been around,—Russell Collins

(Deposition of J. A. Vance.)

had been up to see Helen Southerland and trying to get her to withdraw.

Q. And did she call you about it or write you?

A. I don't know whether she wrote me or called me.

Q. She contacted you, however, did she, do you recall? A. I don't recall now.

Q. And did you contact the other plaintiffs, M. I. Higgens, Maybelle Higgens, about becoming plaintiffs in this suit? A. No, sir.

Q. Who contacted them?

A. Mr. Bateham and Mr. Woodworth.

Q. (By Mr. Moore) You stated something to the effect that you were interested in that proposal, —in your son Lloyd's proposal?

A. Yes, I was interested.

Q. In a fatherly way, to see him succeed, is that what you mean, or what do you mean?

A. Well, both ways; financially and——

Redirect Examination

Q. You knew the amounts which were to be paid up, did you not? A. $70,000?

Q. Yes. A. Yes.

Q. You knew what that was to be used for?

A. It was a guarantee.

Q. How do you mean, Mr. Vance, a guarantee?

A. Well, they figured on letting the other stockholders in on the proposal,—they could take stock in that company, the same as they had in the other company.

(Deposition of J. A. Vance.)

Q. And you expected to participate in it if it was obtained? A. Yes, I expect so.

[Endorsed]: No. 10078. United States Circuit Court of Appeals for the Ninth Circuit. Helen M. Sutherland, Charles W. Sutherland, M. I. Higgens, Maybelle Higgens and Helen Maude Lorenz, Appellants, vs. Frank A. Garbutt, Chandis Securities Company, a corporation, Alice Clark Ryan, Log Cabin Mines Company, a corporation, and Mutual Gold Corporation, a corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 6, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10078

HELEN M. SUTHERLAND, CHAS W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

STATEMENT OF THE POINTS UPON WHICH APPELLANTS INTEND TO RELY ON THIS APPEAL

1. All contracts entered into between appellee Mutual Gold Corporation, appellee Frank A. Garbutt and appellee Log Cabin Mines Company, and the transfer of substantially all the assets of Mutual Gold Corporation thereunder are ultra vires and beyond the powers of Mutual Gold Corporation.

2. The various contracts between Mutual Gold Corporation and Frank A. Garbutt, and between said parties and Log Cabin Mines Company, and the transfer of substantially all the assets of Mutual Gold Corporation thereunder, purportedly

made pursuant to or authorized by action of the stockholders of Mutual Gold Corporation, were made without the required notice of such proposed action and are therefore illegal and void.

3. The various of said contracts and transfers which purportedly were authorized by the board of directors of Mutual Gold Corporation were inadequately and improperly so authorized and are therefore illegal and void.

4. Said contracts and transfer were made upon a consideration which was not cash and are therefore illegal and void.

5. Said transfer of assets was equivalent to a sale of said assets.

6. The considerations for said contracts and said transfer are invalid.

7. The transfer of said assets was made without adequate provision for the payment of creditors of Mutual Gold Corporation or the consent of said creditors and is therefore illegal and void.

8. The Judgment of the District Court in approving said contracts and transfer upholds laws of the State of Washington which thereby impair the obligations of contracts of the stockholders of Mutual Gold Corporation, in violation of Section 10 of Article 1 of the Constitution of the United States and Section 23 of Article 1 of the constitution of the State of Washington.

9. The judgment of the District Court in approving said contracts and transfer upholds laws of the State of Washington which thereby impair the obli-

gations of contracts of the creditors of Mutual Gold Corporation, in violation of Section 10 of Article 1 of the Constitution of the United States and Section 23 of Article 1 of the constitution of the State of Washington.

10. The Judgment of the District Court in approving said contracts and transfer upholds laws of the State of Washington which thereby deprive the stockholders of Mutual Gold Corporation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 3 of Article 1 of the constitution of the State of Washington.

11. The Judgment of the District Court in approving said contracts and transfer upholds laws of the State of Washington which thereby deprive the creditors of Mutual Gold Corporation of property without due process of law, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States and Section 3 of Article 1 of the constitution of the State of Washington.

12. The making of said contracts and the transfer of said assets were entered into because of business compulsion and are therefore either void or voidable.

13. Those certain contracts and transfer of assets thereunder, made between Mutual Gold Corporation and Frank A. Garbutt, and that certain contract made between Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company

(the creature corporation of Frank A. Garbutt), and transfer of assets thereunder, are illegal and void for the reason that said contracts were negotiated and entered into by Frank A. Garbutt both individually, as trustee for Mutual Gold Corporation, and on behalf of said Log Cabin Mines Company, and Frank A. Garbutt derived certain personal benefits thereunder.

14. Said contract between Mutual Gold Corporation, Frank A. Garbutt and Log Cabin Mines Company, and all transfers of said assets to said Log Cabin Mines Company, were illegal and void for the reason that said corporations had at said times certain common directors.

Dated: March 3, 1942.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
By FREDERICK D. ANDERSON,
Attorneys for Appellants.
Address: 650 Subway Terminal Bldg., Los Angeles, Calif.
Telephone: MIchigan 0804.

Received copy of the within Statement of the Points Upon Which Appellants Intend to Rely on this Appeal this 4th day of March, 1942.

DAVID E. HINCKLE,
By DAVID E. HINCKLE,
Attorney for Appellees Frank A. Garbutt, Alice Clark Ryan, Log Cabin Mines Company and Mutual Gold Corporation.

Received copy of the within Statement of the Points Upon Which Appellants Intend to Rely on this Appeal this 4th day of March, 1942.

RICHARD G. ADAMS,
By RICHARD G. ADAMS,
Attorney for Appellee Chandis Security Company.

[Endorsed]: Filed Mar. 6, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants herein designate the following portions of the record, proceedings and documents transmitted to this Court by the Clerk of the District Court of the United States, for the Southern District of California, Central Division, to be contained in the record on appeal, to wit:

I. Complaint.

II. Plaintiff's Bill of Particulars.

III. Answer of Frank A. Garbutt, Alice Clark Ryan and Log Cabin Mines Company.

IV. Answer of Mutual Gold Corporation.

V. Answer of Chandis Securities Company.

VI. Reply of plaintiffs to Answer of defendant Mutual Gold Corporation.

VII. Reply of plaintiffs to Answer of defendants Frank A. Garbutt, et al.

VIII. Memorandum of opinion and minute order thereon.

IX. Findings of Fact and Conclusions of Law.

X. Judgment.

XI. The following portions of the reporter's Transcript of proceedings had and testimony taken on the trial:

1. Page 39, line 18 to page 40, line 4, inclusive
2. Page 40, lines 12 to 26 inclusive.
3. Page 50, line 24, to page 51, line 3, inclusive.
4. Page 137, lines 14 to 19 inclusive.
5. Page 138, line 4 to page 139, line 19, inclusive.
6. Page 140, lines 6 to 16 inclusive.
7. Page 146, line 12 to page 148, line 17, inclusive.
8. Page 149, lines 2 to 9 inclusive.
9. Page 150, line 1, to page 152, line 21, inclusive.
10. Page 157, line 1, to page 158, line 4, inclusive.
11. Page 160, line 13, to page 162, line 5, inclusive.
12. Page 162, lines 15 to 22, inclusive.
13. Page 163, lines 11 to 17 inclusive.
14. Page 168, lines 1 to 26 inclusive.
15. Page 170, line 25, to page 171, line 17, inclusive.
16. Page 172, line 14 to page 173, line 20, inclusive.
17. Page 174, line 1, to page 175, line 4, inclusive.

18. Page 175, line 17, to page 177, line 8, inclusive.

19. Page 178, lines 1 to 8 inclusive.

20. Page 178, line 16, to page 179, line 14, inclusive.

21. Page 180, lines 1 to 7 inclusive.

22. Page 180, line 14, to page 181, line 4, inclusive.

23. Page 185, line 1, to page 188, line 7, inclusive.

24. Page 193, lines 1 to 5 inclusive.

25. Page 196, line 24, to page 198, line 8, inclusive.

26. Page 203, line 13, to page 204, line 10, inclusive.

27. Page 206, line 26, to page 207, line 14, inclusive.

28. Page 207, line 19, to page 208, line 5, inclusive.

28a. Page 221, lines 5 to 10 inclusive.

29. Page 231, line 26, to page 232, line 17, inclusive.

30. Page 234, lines 19 and 20.

31. Page 241, line 13.

32. Page 247, line 13, to page 248, line 5, inclusive.

33. Page 248, line 17, to page 250, line 22, inclusive.

34. Page 266, lines 1 to 18 inclusive.

35. Page 268, line 12, to page 271, line 7, inclusive.

36. Page 273, line 26, to page 274, line 6, inclusive.

37. Page 274, line 19.

38. Page 275, line 7, to page 281, line 11, inclusive.

39. Page 284, lines 5 to 24 inclusive.

40. Page 286, line 1.

41. Page 286, line 16, to page 287, line 14, inclusive.

42. Page 288, line 4, to page 290, line 15, inclusive.

43. Page 297, lines 1 to 24 inclusive.

44. Page 301, line 19, to page 302, line 7, inclusive.

45. Page 303, line 16, to page 304, line 13, inclusive.

46. Page 306, lines 17 to 22 inclusive.

47. Page 307, line 5.

48. Page 307, line 24, to page 308, line 2, inclusive.

49. Page 312, line 12, to page 313, line 1, inclusive.

50. Page 317, lines 10 to 16 inclusive.

51. Page 319, lines 11 to 14 inclusive.

52. Page 319, line 23, to page 320, line 5, inclusive.

53. Page 320, line 11, to page 322, line 21, inclusive.

54. Page 323, line 7, to line 24, inclusive.

55. Page 325, line 1, to page 326, line 8, inclusive.

56. Page 371, lines 1 to 6 inclusive.

57. Page 371, line 11, to page 374, line 5, inclusive.

58. Page 374, line 19, to page 375, line 16, inclusive.

59. Page 376, line 16, to page 381, line 5, inclusive.

60. Page 382, lines 14 to 18 inclusive.

61. Page 386, lines 13 to 25, inclusive.

62. Page 432, line 19.

63. Page 439, line 25, to page 442, line 16, inclusive.

64. Page 443, lines 3 to 14 inclusive.

65. Page 447, lines 5 to 9 inclusive.

66. Page 448, line 21 to page 449, line 13, inclusive.

67. Page 450, lines 5 to 17 inclusive.

68. Page 455, line 23, to page 458, line 23, inclusive.

69. Page 459, line 11, to page 462, line 22, inclusive.

70. Page 463, lines 15 to 20, inclusive.

71. Page 464, lines 19 to 26, inclusive.

72. Page 469, line 19.

73. Page 470, lines 1 to 14, inclusive.

74. Page 474, line 5, to page 476, line 13, inclusive.

75. Page 478, line 17, to page 479, line 19, inclusive.

76. Page 484, line 17, to page 485, line 5, inclusive.

77. Page 498, lines 1 to 3, inclusive.

78. Page 499, line 5.

79. Page 499, line 23, to page 500, line 3, inclusive.

80. Page 501, line 17.

81. Page 502, line 22, to page 503, line 14, inclusive.

82. Page 507, line 16, to page 510, line 2, inclusive.

83. Page 511, lines 5 to 18, inclusive.

84. Page 512, lines 10 to 20, inclusive.

85. Page 524, line 1, to page 525, line 12, inclusive.

86. Page 530, line 14, to page 531, line 23, inclusive.

87. Page 534, lines 1 to 4, inclusive.

88. Page 535, lines 5 to 17, inclusive.

89. Page 536, lines 6 to 22, inclusive.

XII. Exhibits introduced at the trial by plaintiffs, as follows, to wit:

No. 1. Articles of Incorporation of Mutual Gold Corporation, together with the by-laws attached thereto.

No. 5. Minutes of meeting of directors of Mutual Gold Corporation held July 18, 1938.

No. 6. Notice of annual meeting of stockholders of Mutual Gold Corporation. Date of meeting Auguest 6, 1938.

No. 8. Letter dated July 20, 1938, from J. E. Stiegler, President, to Mutual Gold Corporation stockholders.

No. 9. Minutes of annual meeting of stockholders of Mutual Gold Corporation held August 6,

1938, together with letter dated August 5, 1938, from Lloyd J. Vance to the board of directors of Mutual Gold Corporation and draft of agreement, both attached thereto.

No. 10. Minutes of meeting of directors of Mutual Gold Corporation held August 6, 1938.

No. 11. Letter dated August 25, 1938, from Frank A. Garbutt to Mutual Gold Corporation.

No. 12. Letter dated September 2, 1938, from Frank A. Garbutt to Mutual Gold Corporation.

No. 14. Minutes of adjourned annual meeting of the board of directors of Mutual Gold Corporation dated September 7, 1938.

No. 15. Unsigned letter dated September 9, 1938, to Mutual Gold Corporation.

No. 16. Letter dated September 12, 1938, from J. E. Stiegler, President, to the stockholders of Mutual Gold Corporation.

No. 17. Notice of special meeting of the stockholders of Mutual Gold Corporation of September 24, 1938. (Writing on back of the exhibit is disclaimed as part of the exhibit. See Transcript, page 40, lines 16 to 19.)

No. 18. Form of proxy for the meeting of September 24, 1938. (Writing appearing on the exhibit is disclaimed as part of the exhibit. See Transcript page 40, lines 21 to 26.)

No. 19. Letter from J. E. Stiegler, President, dated September 16, 1938, to J. E. Stiegler and other directors of Mutual Gold Corporation.

No. 20. Letter dated September 12, 1938, from Frank A. Garbutt to M. F. Haley.

No. 21. Printed postcard dated September 20, 1938, from J. E. Stiegler, President, to stockholders of Mutual Gold Corporation.

No. 22. Minutes of special meeting of directors of Mutual Gold Corporation dated September 19, 1938.

No. 26. Progress report from Frank A. Garbutt to the board of directors of Mutual Gold Corporation, dated September 23, 1938.

No. 27. Letter from J. E. Stiegler, President, dated September 26, 1938, to the stockholders of Mutual Gold Corporation.

No. 28. Letter dated October 3, 1938, from Chandis Securities Company and Alice Clark Ryan to Mutual Gold Corporation.

No. 30. Minutes of special meeting of directors of Mutual Gold Corporation dated October 21, 1938.

No. 34. Minutes of special meeting of directors of Mutual Gold Corporation, dated November 7, 1938.

No. 39. Minutes of special meeting of board of directors of Mutual Gold Corporation, dated December 17, 1938.

No. 41. Minutes of fourth meeting of the board of directors of Log Cabin Mines Company, dated January 4, 1939.

No. 42. Printed progress report dated January 8, 1939, from Frank A. Garbutt, to the board of

directors of Mutual Gold Corporation and Mr. J. E. Stiegler, President.

No. 43. Printed letter from Mutual Gold Corporation, dated January 14, 1939, to the stockholders of Mutual Gold Corporation.

No. 44. Minutes of the fifth meeting of the board of directors of Log Cabin Mines Company, dated March 6, 1939.

No. 60. Schedule of directors and officers of Log Cabin Mines Company.

No. 62. Letter dated November 5, 1938, from Frank A. Garbutt to M. F. Haley.

No. 83. Letter dated October 22, 1938, from Frank A. Garbutt to M. F. Haley.

No. 84. Letter dated November 19, 1938, from Frank A. Garbutt to M. F. Haley. (Writing on the back of the exhibit is disclaimed as a part thereof. See Transcript page 187, lines 9 to 13, and page 188, lines 1 to 7, inclusive.)

No. 91. Series of letters between Mr. Garbutt and Mr. Grill dated from April 15, 1939, to June 8, 1939, inclusive, consisting of three letters to Mr. Grill and four letters to Mr. Garbutt.

No. 94. Notice of annual meeting of stockholders of Mutual Gold Corporation to be held February 1, 1939.

No. 95. Proxy form solicited by management for stockholders' meeting of Mutual Gold Corporation to be held February 1, 1939.

No. 98. Letter of August 12, 1938, to board of

directors of Mutual Gold Corporation from Lloyd J. Vance at Seattle, Washington.

XIII. Exhibits introduced at the trial by defendants, as follows, to wit:

"J" Agreement dated August 23, 1939, between Mutual Gold Corporation, first party, Frank A. Garbutt, second party, and Log Cabin Mines Company, third party.

"L" Carbon copy of letter dated January 12, 1939, to William L. Grill from Frank A. Garbutt.

"O" Assignment of contract by Frank A. Garbutt to Log Cabin Mines Company, dated March 10, 1939.

XIV. The following portions of the deposition of Helen Maude Lorenz:

1. Question No. (1), and answer thereto.
2. Questions No. (8) to (22) inclusive, and the respective answers thereto.
3. Questions Nos. (25) and (26) and the respective answers thereto.

XV. The following portions of the deposition of Helen M. Sutherland:

1. Page 2, lines 3 to 9 inclusive.
2. Page 3, lines 13 to 15 inclusive.
3. Page 6, lines 1 to 10 inclusive.
4. Page 7, lines 10 to 25 inclusive.
5. Page 8, line 15 to page 9, line 8 inclusive.

XVI. The following portions of the deposition of M. I. Higgens:

1. Page 21, lines 9 to 26 inclusive.
2. Page 23, lines 9 to 29 inclusive.
3. Page 24, lines 1 and 2.

4. Page 24, line 26, to page 25, line 4, inclusive.
5. Page 50, lines 17 to 19 inclusive.
6. Page 55, line 20, to page 56, line 4, inclusive.

XVII. The following portions of the deposition of Maybelle Higgens:

1. Page 43, line 20, to page 44, line 5, inclusive.
2. Page 47, lines 18 and 19.
3. Page 48, lines 5 to 21 inclusive.

XVIII. The following portions of the deposition of A. P. Bateham:

1. Page 56, lines 21 to page 57, line 10, inclusive.
2. Page 57, line 21, to page 58, line 22, inclusive.
3. Page 60, line 21, to page 62, line 2, inclusive.
4. Page 72, lines 1 to 6, inclusive.

XIX. The following portions of the deposition of Frank A. Garbutt in the case of "J. A. Vance vs. Mutual Gold Mining Company" in the Superior Court of the State of Washington, in and for the City of Spokane, No. 103068, to wit:

1. Page 2, lines 12 to 17, inclusive.
2. Page 3, lines 1 and 2.
3. Page 31, lines 19 and 20.
4. Page 39, lines 3 and 4.
5. Page 39, lines 8 to 16, inclusive.
6. Page 39, line 18 to page 40, line 8, inclusive.
7. Page 40, lines 12 to 19 inclusive.
8. Page 49, line 26, to page 50, line 8, inclusive.
9. Page 50, line 20, to page 51, line 4, inclusive.
10. Page 59, line 21, to page 62, line 9, inclusive.
11. Page 86, line 20, to page 87, line 18, inclusive.
12. Page 88, line 14, to page 92, line 23, inclusive.
13. Page 105, line 3, to page 106, line 7, inclusive.

XX. Notice of Appeal.

XXI. Statement of the points upon which appellants intend to rely on this appeal.

XXII. This designation of contents of record on appeal.

Dated: March 3, 1942.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
By FREDERICK D. ANDERSON.
Attorneys for Appellants.
Address: 650 Subway Terminal Bldg., Los Angeles, Calif.
Telephone: MIchigan 0804.

Received copy of the within Designation of Contents of Record on Appeal this 4th day of March, 1942.

DAVID E. HINCKLE
By DAVID E. HINCKLE
Attorney for Appellees Frank A. Garbutt, Alice Clark Ryan, Log Cabin Mines Company and Mutual Gold Corporation.

Received copy of the within Designation of Contents of Record on Appeal this 4th day of March, 1942.

RICHARD G. ADAMS
By RICHARD G. ADAMS
Attorney for Appellee Chandis Securities Company.

[Endorsed]: Filed Mar. 6, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF THE RECORD THOUGHT TO BE MATERIAL BY APPELLEES FRANK A. GARBUTT, ALICE CLARK RYAN, MUTUAL GOLD CORPORATION, AND LOG CABIN MINES COMPANY.

Appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation, and Log Cabin Mines Company, designate the following parts of the record which they think material in addition to those parts designated by the appellants under date of March 3, 1942 and served on said appellees on March 4, 1942:

I.

The following portions of the Reporter's Transcript of Proceedings had and testimony taken at the trial:

1. Page 69, line 23, beginning with "If," to page 70, line 18, inclusive.
2. Page 106, lines 13 to 24, inclusive.
3. Page 108, lines 10 and 11.
4. Page 112, lines 10 to 20, inclusive.
5. Page 140, line 17, to page 145, line 21, inclusive.
6. Page 148, lines 19 to 24, inclusive.
7. Page 153, lines 1 to 24, inclusive.
8. Page 154, lines 2 and 3, and lines 12 to 26, inclusive.
9. Page 158, line 5, to page 160, line 12, inclusive.

10. Page 163, lines 4 to 9, inclusive, and line 18, to page 165, line 15, inclusive.

11. Page 167, lines 2 to 5, inclusive, and lines 9 to 16, inclusive.

12. Page 171, line 18, to page 172, line 13, inclusive.

13. Page 175, lines 5 to 16, inclusive.

14. Page 193, line 24.

15. Page 194, lines 3 to 17, inclusive.

16. Page 195, lines 3 to 16, inclusive.

17. Page 199, lines 4 to 11, inclusive, and lines 20 to 23, inclusive.

18. Page 200, lines 1 to 15, inclusive.

19. Page 202, lines 3 to 24, inclusive.

20. Page 203, lines 11 and 12.

21. Page 204, line 11, to page 205, line 6.

22. Page 225, line 22, to page 226, line 6, inclusive.

23. Page 229, line 4, to page 230, line 6, ending with the word "payment."

24. Page 232, line 18, to page 234, line 3, inclusive.

25. Page 234, lines 13 to 18, inclusive.

26. Page 234, lines 25 and 26.

27. Page 235, lines 17 and 18.

28. Page 236, lines 9 to 12, inclusive.

29. Page 236, line 25, to page 237, line 15, inclusive.

30. Page 238, line 15, to page 239, line 6, inclusive.

31. Page 242, lines 15 to 20, inclusive.

32. Page 245, lines 10 to 26, inclusive.

33. Page 251, lines 1 and 2, and lines 5 to 7, inclusive.

34. Page 253, line 11, to page 254, line 19, inclusive.

35. Page 266, line 19, to page 268, line 11, inclusive.

36. Page 271, lines 9 to 15, inclusive.

37. Page 272, line 23, to page 273, line 25, inclusive.

38. Page 274, lines 10 to 16, inclusive.

39. Page 285, lines 4 to 9, inclusive.

40. Page 286, lines 2 to 15, inclusive.

41. Page 298, line 3, to page 301, line 18, inclusive.

42. Page 302, line 8, to page 303, line 8, inclusive.

43. Page 306, lines 8 to 13, inclusive.

44. Page 308, lines 11 to 16, inclusive.

45. Page 309, lines 7 to 14, inclusive.

46. Page 310, line 8, to page 312, line 11, inclusive.

47. Page 313, lines 7 to 9, ending with word "top."

48. Page 314, line 9, to page 315, line 12, inclusive.

49. Page 316, line 14, to page 317, line 6, inclusive.

50. Page 323, line 25, to page 324, line 9, inclusive.

51. Page 326, lines 1 to 8, inclusive.

52. Page 327, line 1, to page 328, line 15, inclusive.

53. Page 328, line 21, beginning with "Isn't," to line 24, inclusive.

54. Page 329, lines 10 and 11.

55. Page 329, line 25, to page 330, line 13, inclusive.

56. Page 334, line 4, to page 335, line 1, inclusive.

57. Page 344, lines 3 to 24, inclusive.

58. Page 345, line 9.

59. Page 346, lines 1 to 3, inclusive.

60. Page 346, line 21, to page 347, line 8, inclusive.

61. Page 352, line 13.

62. Page 354, lines 2 to 11, inclusive.

63. Page 354, line 16, to page 355, line 1, inclusive.

64. Page 359, lines 4 to 26, inclusive.

65. Page 360, lines 6 to 8, inclusive.

66. Page 360, line 14, to page 361, line 5, inclusive.

67. Page 381, line 16, to page 382, line 13, inclusive.

68. Page 383, line 26, beginning with "The," to page 386, line 12, inclusive.

69. Page 386, line 26, to page 387, line 24, inclusive.

70. Page 388, lines 8 to 10, inclusive.

71. Page 389, line 13, to page 390, line 7, inclusive.

72. Page 390, line 18, to page 391, line 21, inclusive.

73. Page 393, lines 12 to 22, inclusive.

74. Page 404, line 19, to page 405, line 1, inclusive.

75. Page 426, lines 15 and 16, and lines 22 to 26, inclusive.

76. Page 427, lines 1 to 24, inclusive, ending with "it."

77. Page 428, line 14, to page 431, line 22, inclusive, ending with "time."

78. Page 432, line 20, to page 433, line 10, inclusive.

79. Page 442, line 17, to page 443, line 2, inclusive.

80. Page 454, lines 11 to 22, inclusive.

81. Page 462, line 23, to page 463, line 14, inclusive.

82. Page 463, line 21, to page 464, line 18, inclusive.

83. Page 465, line 2, to page 469, line 17, inclusive.

84. Page 488, line 1, to page 489, line 8, inclusive.

85. Page 510, lines 3 to 21, inclusive.

86. Page 515, lines 1 to 26, inclusive.

87. Page 518, line 1, to page 523, line 4, inclusive.

88. Page 525, line 14, to page 526, line 3, inclusive.

89. Page 532, lines 1 to 20, inclusive.

90. Page 533, lines 1 to 7, inclusive.

91. Page 537, lines 4 to 23, inclusive.

92. Page 539, line 1, to page 540, line 5, inclusive.

93. Page 549, lines 1 to 12, inclusive.

II.

Exhibits introduced by plaintiffs at trial as follows:

No. 7 Form of proxy.

No. 36 J. E. Stiegler's letter of December 1, 1938 to Mutual Gold Corporation Stockholders.

No. 37 Minutes of Mutual Gold Corporation's directors' meeting of December 9, 1938.

No. 38 Minutes of Mutual Gold Corporation's directors' meeting of November 28, 1938.

No. 63 Copy of draft of agreement proposed by the Vances.

Parts of No. 90; to-wit, the minutes of the annual meeting of the Stockholders of Mutual Gold Corporation held on February 1, 1939.

III.

Exhibits introduced at the trial by defendants as follows:

No. B. Letter undated from Mr. Vance to the Stockholders of Mutual Gold Corporation.

No. C. Letter dated January 21, 1939 from Mr. Vance to noteholders of Mutual Gold Corporation.

No. E. Letter of September 20, 1938 by Charles Dunn and others to Stockholders of Mutual Gold Corporation, together with proxy form.

No. F. Letter of January 30, 1939 by A. P. Bateham to Charles Blank.

No. G. Letter dated Spokane, Washington, September 13, 1938, signed by R. P. Woodworth and others, to Stockholders of Mutual Gold Corporation.

No. H. Letter dated Seattle, Washington, September 17, 1938, signed by N. D. Showalter and others, to Stockholders of Mutual Gold Corporation.

No. I. Report of Stockholders' Protective Committee, dated Spokane, Washington, January 20, 1939, signed by A. P. Bateham, addressed to Stockholders Mutual Gold Corporation.

No. Q. Letter dated December 10, 1938, to Frank A. Garbutt, signed by Mutual Gold Corporation.

No. R. Letter dated April 12, 1939, to Frank A. Garbutt, signed by J. E. Stiegler.

No. S. Copy of Judgment roll in Superior Court case No. 440-367, Log Cabin Mines Company v. Mutual Gold Corporation.

No. T. Judgment roll in case No. 103-067, in Superior Court of State of Washington, J. A. Vance, et al., v. Mutual Gold Corporation.

IV.

Exhibits introduced at the trial by cross-complainant as follows:

No. U. Letter from Frank A. Garbutt of July 8, 1940 to Directors of Mutual Gold Corporation. Include date, heading, addressee, and salutation. Skip to second page, last paragraph beginning "In

reporting the milling results—" Include said paragraph and everything thereafter to and including the paragraph about the middle of the third page beginning "The average assay value is $4.52." Skip to and include the signature.

No. V. Letter dated Los Angeles, California, February 15, 1941, to Richard G. Adams, from Frank A. Garbutt.

No. W. Letter dated Los Angeles, California, February 5, 1941, to Mr. Harry Chandler, Alice Clark Ryan, from Frank A. Garbutt.

V.

The following parts of the deposition of Helen M. Sutherland:

1. Page 10, lines 20 to 24, inclusive.
2. Page 11, lines 5 to 15, inclusive.
3. Page 12, lines 2 to 4, inclusive.
4. Page 12, line 11, to page 13, line 7, inclusive.

VI.

The following parts of the deposition of M. I. Higgens:

1. Page 25, line 23, to page 27, line 21, inclusive.
2. Page 28, line 17, to page 29, line 10, inclusive.
3. Page 29, line 26, to page 30, line 6, inclusive.
4. Page 31, lines 14 to 24, inclusive.
5. Page 34, lines 20 to 23, inclusive.
6. Page 35, lines 4 to 11, inclusive.
7. Page 37, line 10, to page 38, line 3, inclusive.

VII.

The following parts of the deposition of Maybelle Higgens:

1. Page 44, line 18, to page 45, line 21, inclusive.

VIII.

The following parts of the deposition of A. P. Bateham:

1. Page 58, line 23, to page 59, line 18, inclusive.
2. Page 62, lines 11 and 12.
3. Page 63, lines 8 to 29, inclusive.

IX.

The following parts of the deposition of Frank A. Garbutt; case of Vance v. Mutual Gold Mining Company:

1. Page 3, lines 3 and 4.
2. Page 5, lines 6 to 9, inclusive.
3. Page 14, line 10, to page 15, line 13, inclusive.
4. Page 22, lines 21 to 23, inclusive.
5. Page 40, line 20, to page 41, line 3, inclusive.
6. Page 41, line 11, beginning with "I told," to line 15, inclusive.
7. Page 50, lines 9 to 19, inclusive.
8. Page 51, line 5, to page 52, line 26, inclusive.
9. Page 76, line 7, to page 78, line 1, inclusive.
10. Page 96, line 23, to page 98, line 5, inclusive.
11. Page 98, line 22, to page 99, line 5, inclusive.
12. Page 103, lines 1 to 16, inclusive.
13. Page 106, lines 8 to 14, inclusive.

X.

The following parts of the Deposition of G. H. Ferbert:

I am a Stockholder of Mutual Gold Corporation and have been one continuously since the fall of 1933. I own about 90,000 shares. From the time I first took stock in 1933, up until through the fall of 1937, I made advances and took treasury stock for them. I also bought a hundred thousand shares of stock at a cent a share, and I bought some at a cent and a half a share. I sold this stock for what I paid for it, and there was no profit in it and no loss. I was elected a director of the corporation in 1936 and took the directors' oath in August, 1938. I have been one continuously since. The corporation owes me, I think, between $1,200 and $1,300 which I have advanced since May, 1938. I advanced moneys to pay lumber bills, the Lone Pine Lumber Company, Bishop Hardware Company in Mono County, California, watchman's wages to Mr. Sturgeon, and minor bills in Spokane for the office. I advanced money to the office, and they paid it out for bills, whatever they were. I am conversant with the business affairs of the corporation, and have been since I became a Stockholder, and especially since I became a director.

The corporation needed new mining equipment but did not have the money to buy it, or to operate with the old equipment. It did not have the money to pay an installment of $10,000.00 falling due on November 1, 1938 to the owners. I did not know of any way by which it could raise any more money.

Lloyd Vance made a written offer to the Board of Directors to finance the company on certain conditions, but I did not favor it. I proposed to go to California and get a contract with Frank A. Garbutt or some one that he would interest for us. I went to Los Angeles with Mr. Stiegler and Mr. Grill—I believe Mr. Collins was down there—to see Mr. Garbutt about that contract. As director, I voted for the Garbutt contract in preference to the Vance contract. I based my opinion on the man himself. I wanted him on account of his experience. He had been at mining for a lifetime and he was financially responsible, and I thought we would get a fair deal.

The Stockholders' meeting of September 24, 1938 was called off upon advice of counsel, who stated that the Stockholders had already conferred all the powers they had upon the board. No further power was necessary. I paid my own expenses as director. They consisted of traveling expenses to Yakima, Spokane and Seattle, railroad fares to Los Angeles, hotel bills, telephone, telegraph, tolls. I have never been repaid. Mr. Garbutt never advanced me any money in connection with his dealings with Mutual Gold Corporation property.

1. Page 17, line 1, to page 18, line 1, inclusive.
2. Page 18, line 22, to page 19, line 1, inclusive.
3. Page 21, line 25, to page 22, line 10, inclusive.
4. Page 24, line 1, to page 25, line 1, inclusive.
5. Page 27, line 19, to page 28, line 7, inclusive.
6. Page 29, line 16, beginning with "Were", to page 30, line 1, inclusive.

7. Page 35, line 12, to page 36, line 24, inclusive.
8. Page 37, line 17, to page 38, line 23, inclusive.
9. Page 39, line 15, to page 40, line 1, inclusive.
10. Page 40, line 16, to page 41, line 1, inclusive.

XI.

The following parts of the Deposition of J. H. Vance:

1. Page 2, lines 1 to 21, inclusive.
2. Page 2, line 27, to page 4, line 3, inclusive.
3. Page 13, line 18, to page 14, line 18, inclusive.
4. Page 17, line 3, to page 18, line 9, inclusive.
5. Page 22, lines 13 to 16, inclusive.
6. Page 25, line 12, to page 26, line 27, inclusive.
7. Page 30, line 6, to page 31, line 4, inclusive.
8. Page 33, lines 5 to 23, inclusive.
9. Page 34, line 22, to page 35, line 3, inclusive.
10. Page 35, line 26, to page 36, line 4, inclusive.
11. Page 36, lines 11 to 22, inclusive.
12. Page 36, line 30, to page 37, line 5, inclusive.
13. Page 38, line 7, to page 39, line 9, inclusive.
14. Page 39, lines 14 to 25, inclusive.

XII.

This designation of additional parts of the record by appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation, and Log Cabin Mines Company.

DAVID E. HINCKLE

Attorney for appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation, and Long Cabin Mines Company.

Received copy of the within Designation of additional parts of the record thought to be material by appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation, and Log Cabin Mines Company on this 13th day of March, 1942.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
By FREDERICK D. ANDERSON,
Attorneys for Appellants

Received copy of the within Designation of additional parts of the record thought to be material by appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation, and Log Cabin Mines Company on this 13th day of March, 1942.

RICHARD G. ADAMS,
By RICHARD G. ADAMS,
Attorney for Appellee Chandis Securities Company

[Endorsed]: Filed Mar. 14, 1942.

[Title of Circuit Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants herein designate the following portions of the record, proceedings and documents transmitted to this Court by the Clerk of the District Court of the United States, for the Southern

District of California, Central Division, to be contained in the record on appeal, which portions are supplemental to those heretofore designated by appellants under date of March 3, 1942, to wit:

I. The following portions of the Reporter's Transcript of proceedings had and testimony taken on the trial:

1. Page 426, line 8, through the word "gross" in line 12.
2. Page 444, line 25, to page 445 line 14, inclusive.
3. Page 449, line 14, through the words and figures "and No. 4" in line 19, inclusive.
4. Page 541, lines 1 to 20 inclusive.

II. The following portions of the deposition of Helen M. Sutherland:

1. Page 13, line 10, to page 14, line 1, inclusive.
2. Page 14, line 14, to page 19, line 19, inclusive.
3. Page 20, line 13, to page 21, line 4, inclusive.

III. The following portions of the deposition of M. I. Higgens:

1. Page 29, lines 11 to 25 inclusive.
2. Page 30, lines 7 to 26 inclusive.
3. Page 34, line 24, to page 35, line 3, inclusive.
4. Page 35, line 12, to page 36, line 22, inclusive.
5. Page 38, lines 17 to 21 inclusive.
6. Page 39, line 1 to page 40, line 12, inclusive.

IV. The following portions of the deposition of Maybelle Higgens:

1. Page 50, lines 1 to 12 inclusive.

V. The following portions of the deposition of A. P. Bateham:

1. Page 63, line 30, to page 64, line 8, inclusive.

VI. The following portions of the deposition of Frank A. Garbutt in the case of "J. A. Vance vs. Mutual Gold Mining Company" in the Superior Court of the State of Washington in and for the City of Spokane, No. 103068, to wit:

1. Page 3, line 15, to page 5, line 5, inclusive.
2. Page 41, lines 5 to 8 inclusive.
3. Page 44, line 17 to page 48, line 12, inclusive.
4. Page 75, line 24 to page 76, line 6, inclusive.
5. Page 87, line 19, to page 88, line 13, inclusive.
6. Page 98, lines 6 to 21 inclusive.
7. Page 106, line 15 to page 107, line 15, inclusive.

VII. The following portions of the deposition of G. H. Ferbert:

1. Page 25, line 2, to page 26, line 12 inclusive.
2. Page 38, line 24, to page 39, line 14 inclusive.
3. Page 41, lines 2 to 7 inclusive.

VIII. The following portions of the deposition of J. A. Vance:

1. Page 18, line 10 to page 22, line 11, inclusive.
2. Page 22, line 17, to page 25, line 11 inclusive.
3. Page 33, lines 24 to 30, inclusive.
4. Page 37, line 6, to page 38, line 6, inclusive.
5. Page 40, line 4, to page 41, line 3, inclusive.
6. Page 44, lines 8 to 14, inclusive.
7. Page 45, lines 16 to 28, inclusive.

IX. This supplemental designation of contents of record on appeal, including stipulation set forth below.

Dated: March 25, 1942.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
By FREDERICK D. ANDERSON,
Attorneys for Appellants
Address: 650 Subway Terminal Bldg.
Los Angeles, California
Telephone: MIchigan 0804

Receipt of copy of the foregoing Supplemental Designation of Contents of Record on Appeal is hereby acknowledged this 25th day of March, 1942, by David E. Hinckle, attorney for appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation and Log Cabin Mines Company, and

It is hereby stipulated that said Supplemental Designation of Contents of Record on Appeal be included in the printed record and that appellants by such designation and stipulation do not waive any right they may have under rule 75(e), or any other rule, in connection with the designation of additional parts of the record heretofore made by said appellees.

It is further stipulated that neither appellants nor said appellees will make further designation of matters to be included in the printed record.

It is further stipulated that Exhibits 7, 63 and

"K" designated by said appellee to be included in the printed record, shall be omitted therefrom.

Dated: March 25, 1942.

DAVID E. HINCKLE,
Attorney for Appellees Frank A. Garbutt, Alice Clark Ryan, Mutual Gold Corporation and Log Cabin Mines Company.

W. H. ABEL,
O. C. MOORE,
FREDERICK D. ANDERSON,
By FREDERICK D. ANDERSON,
Attorneys for Appellants

Receipt of copy of the foregoing Supplemental Designation of Contents of Record on Appeal with stipulation annexed thereto is hereby acknowledged this 25th day of March, 1942.

Dated: March 25, 1942.

RICHARD G. ADAMS,
Attorney for appellee Chandis Securities Company

[Endorsed]: Filed Mar. 27, 1942.

No. 10,078

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

APPELLANTS' OPENING BRIEF.

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No. 10,078

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vs.

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Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

This is an appeal from a decision of the United States District Court, Southern District of California, Central Division, rendered October 30, 1941, wherein the District Court rendered judgment for the defendants below, who are appellees in this Court.

Diversity of citizenship exists as between the plaintiffs and the defendants [Complant, par. I, II, Tr. 2, 3;

Emphasis throughout the brief is supplied.

Answer Mutual Gold, par. I, Tr. 133; Answer Chandis Securities Company, par. I, Tr. 145; Answer Frank A. Garbutt *et al.,* par. I, Tr. 122; Findings I, II and III, Tr. 180, 181]. The matter in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00 [Complaint, par. III, Tr. 3; Finding VII, Tr. 182]. Jurisdiction of the District Court therefore lies under Sec. 41 (1), Title 28, U. S. C. A. (Judicial Code, section 24, amended).

Appellant has appealed to this Court from paragraph I of the final judgment [Tr. 207]. Notice of appeal was given within three months from October 30, 1941, to wit, January 26, 1942 [Tr. 208]. Jurisdiction of this Court therefore lies under section 225(a) First, and (d), Title 28, U. S. C. A. (Judicial Code, section 128, amended).

Introductory Statement.

This is a derivative action brought by plaintiff stockholders of appellee Mutual Gold Corporation, a corporation organized under the laws of the State of Washington [Finding III, Tr. 181]. The plaintiffs have not waived or consented to the acts complained of [Tr. 699, 700, 719-723, 725, 738].

The facts of the case are complicated but by way of introduction may be summarized in a single paragraph as follows:

Appellee Mutual Gold Corporation, a Washington mining corporation, hereinafter referred to as "Mutual Gold", needing funds to pay its debts and more fully develop its

gold mine, had two offers of financial assistance. It accepted the one made personally by appellee Frank A. Garbutt, hereinafter referred to as "Garbutt", the agent of the owners of the mining claims being purchased by it. Garbutt obtained majority ownership and control of the mine. This was accomplished by making and pressing on behalf of the owners a forfeiture of the contract through which the mine was being purchased by Mutual Gold. Through this means Garbutt induced Mutual Gold to enter a series of contracts, which can be considered as one transaction, pursuant to which Mutual Gold conveyed substantially all of its assets to Log Cabin Mines Company, hereinafter referred to as "Log Cabin", a California corporation formed for the purpose of accepting said assets and carrying out Garbutt's offer. Said corporation had no other assets except $10,000.00 subscribed for its stock. A minority of the stock of Log Cabin was issued to Mutual Gold and a majority went to said Garbutt who promoted and controlled Log Cabin as his creature corporation. The only consideration given for this transaction by Garbutt was the agreement upon Garbutt's part to advance $10,000.00 about to become due on the purchase price of the mining claims, he having the right to retire at any time from other optional commitments of the contracts. No provision was made to take care of the outstanding creditors of Mutual Gold. These contracts were authorized either by the directors alone or by additional vote of less than all the stockholders of Mutual Gold.

Questions Involved in This Appeal.

1. Where a mining corporation was organized in the State of Washington under laws which did not provide for the transfer of all the assets of the corporation, may substantially all such assets be sold or exchanged without unanimous consent of the stockholders if the corporation is a solvent, going concern, or for anything other than cash if the corporation is insolvent or in a failing condition?

2. Does the power reserved in the constitution of the State of Washington to amend the corporate laws permit the Legislature to adopt an amendatory corporation law governing the transfer of all the assets of such corporation or are the rights of the stockholders of said Washington corporation with respect to the sale or exchange of assets, vested rights and therefore entitled to protection under federal and state constitutional provisions relating to impairment of the obligation of contracts and due process of law?

3. Does said 50% of the stock issue of said mining corporation, less one share, together with the obligation of said promoter and manager to advance $10,000.00 to pay installment on purchase of company's assets consisting of mining claims, plus only his optional right to advance certain monies toward the development of said mining property, constitute an adequate consideration for the transfer of substantially all the assets of said mining corporation?

4. Can a corporation sell or exchange substantially all of its assets without notice to the stockholders that such action will be taken?

5. Does a notice of a stockholders' meeting stating that such meeting shall act upon a proposed specific transaction with a named party and a sale of the assets as the stockholders may determine, and shall make such other or different agreement as they in their absolute discretion deem advisable, constitute a notice sufficient to authorize a contract with another unnamed party for sale or exchange of substantially all the assets for one-half of the capital stock less one share of the stock of a new corporation plus certain optional rights not requiring said unnamed party (who became the manager and majority stockholder of said new corporation) to advance certain monies toward the development of the corporation's properties?

6. Was said transfer authorized by the articles of incorporation providing that said Washington corporation might sell, exchange, lease, or in any other manner dispose of the whole or any part of its property?

7. Did the right of said manager to advance money for the development of said property with optional right to withdraw at any time pursuant to a contract between said Washington corporation, said manager and said new corporation, providing that the net proceeds accruing to the Washington corporation should first be paid to discharge its indebtedness to its creditors, amount to an

adequate provision for the taking care of said creditors without which the transfer would be illegal and void?

8. Was said transfer of assets illegal and void for the reason that it made no provision for the creditors of the Washington corporation and thereby violated certain federal and state constitutional provisions relating to the impairment of the obligation of contracts and due process of law?

9. Where the agent of the owners of certain mining claims, under process of sale by installment contract to a corporation, declared and pressed a forfeiture of said sale contract, and at the same time negotiated and consummated an agreement between said purchasing corporation and said agent personally, providing for the sale or exchange of substantially all the assets of said corporation to a new corporation of which said agent was promoter, manager and majority stockholder, do said acts bring this transaction within the doctrine of business compulsion, rendering said sale or exchange illegal and void or voidable?

10. Is a contract and sale or transfer of assets of a mining corporation to a new corporation organized for the sole purpose of acquiring said assets, illegal and void where the promoter, manager and majority stockholder of said new corporation negotiated said contract as trustee for said mining corporation and as a representative of the new corporation, and also derived certain personal benefits thereunder?

11. Was said contract illegal and void because of the existence of certain common directors on the boards of the transferor and transferee corporations?

Statement of the Case.

The facts will now be stated more fully, but as briefly as their complicated character will permit.

Mutual Gold was a mining corporation organized May 11, 1932, under the laws of the State of Washington [Finding III, Tr. 181]. Its principal asset was the purchase contract of its mining claims known as the Log Cabin Mine, situate in Mono County, California [Tr. 23, *et seq.*; Finding VIII, Tr. 182, 183]. This contract, as amended, provided for payment of annual installments of $10,000.00 during the period involved in this action. Mutual Gold as assignee of the original purchasers entered into possession, paid a total of $20,000.00 on said purchase price and expended in excess of $150,000.00 [Finding IX, Tr. 183] constructed a pilot mill [Finding X, Tr. 184], and in 1936 made a contract whereby J. A. Vance, director, vice president, a large stockholder and the largest creditor of the company, was appointed general manager in charge of operations until outstanding production notes should be paid [Finding X, Tr. 185; Tr. 42]. Later, under the transactions complained of Garbutt took possession and control.

In July, 1938, Mutual Gold was in need of funds to build a larger mill and Lloyd J. Vance, son of said J. A. Vance, for himself and J. A. Vance, submitted a plan in substance that Mutual Gold assign a half interest in its assets to a corporation to be organized which was to have the operation of the mine, opportunity being given to the stockholders of Mutual Gold to subscribe for stock in this corporation [Finding X, Tr. 184; Tr. 232, 255, 257]. The Vance plan made provision to take care of outstanding obligations owed to Mutual Gold's creditors

[Tr. 234-236, 261, 266]. The directors of Mutual Gold, at the meeting of July 18, 1938, authorized this plan to be submitted to a stockholders' meeting to be held August 6, 1938 [Tr. 236]. Neither the president's letter [Finding XII, Tr. 187; Tr. 241], the call for the meeting [Finding XI, Tr. 186; Tr. 239], nor the form of proxy solicited [Finding XIII, Tr. 188], made mention of Garbutt or of a new corporation to be organized to take over the assets of Mutual Gold or of the transactions ultimately arrived at. The stockholders' meeting of August 6th, by a vote of somewhat in excess of two-thirds of the outstanding stock, gave discretion to the board of directors to sell or otherwise dispose of the assets as they might determine [Findings XIII, XIV, Tr. 187-190]. At the directors' meeting held the same day the cleavage caused by the attempts of both Vance and Garbutt to obtain a contract continued [Tr. 246, 241, 252, 272-277]. The majority declined to go through with the Vance deal and continued negotiations that had begun with Garbutt [Tr. 277]. While these negotiations were in progress, on August 25, 1938, Garbutt, as representative of the owners of the mining claims, mailed a notice of forfeiture of the purchase contract to Mutual Gold and to Vance, its manager [Tr. 278]. This was read at the directors' meeting of August 27, 1938 in Spokane, and a resolution passed that the board proceed to Los Angeles. Stiegler, the president, Grill, also the attorney for the company, and other directors went to Los Angeles, and under date of September 2, 1938 Mutual Gold and Gar-

butt entered into the contract of that date, which was subsequently re-executed on September 22, 1938. On September 2, 1938, the very day the first contract was signed, Garbutt wrote a second letter of forfeiture, and on September 9, 1938 a third letter of like tenor [Tr. 279, 289]. Other pressure was brought to bear by Garbutt [Tr. 386, 387]. Garbutt's representation of the owners, who are appellees Alice Clark Ryan and Chandis Securities Company, continued until October 3, 1938 when notice of termination of his agency was given by the owners in a letter reiterating the forfeiture [Tr. 314]. There were confused efforts to obtain full corporate ratification by Mutual Gold, including the calling of a stockholders' meeting and its cancellation [Finding XVII, Tr. 191; Tr. 288, 295, 296, 305]. September 19, 1938 the board specifically approved the September contract, declining to reconsider its approval of September 7, 1938 [Tr. 301-303, 285, 286]. The stockholders never ratified said contract. See also Finding XVIII, Tr. 191, which quotes the resolution of ratification set out at Tr. 303, 304, but erroneously refers to the meeting as September 7, 1938 instead of September 19, 1938.

Meanwhile, and prior to September 2, 1938, Garbutt had advanced $500.00 on deposit for construction of a power line, had employed Haley and Sturgeon as superintendents at the mine. On September 21, 1938 Mutual Gold transferred its assets to Garbutt by deed, assignment of the purchase contract and bill of sale [Tr. 58, 60, 62; Finding XIX, Tr. 192]. On October 15, 1938

the owners of the mining claims reinstated the purchase contract and thereafter Garbutt continued his preparation for the development of the property. On October 19, 1938 Log Cabin was incorporated under the laws of California by Garbutt, who at all times completely controlled said corporation, acting as promoter, trustee, general manager, principal creditor and being the majority stockholder [Findings XX-XXIII, Tr. 193, 194]. On October 31, 1938 Garbutt gave notice of termination of the September contracts and attached to said notice an interim agreement of November 1, 1938 between Mutual Gold and Garbutt [Finding XXVI, Tr. 194, 195; Tr. 65]. It was ratified by the board of directors on November 7, 1938 with no attempt to obtain stockholders' approval [Tr. 322-324]. Mutual Gold subscribed to all the capital stock of Log Cabin, borrowing from Garbutt $10,000.00 for the purpose [Finding XXX, Tr. 197]. 50% less one share of Log Cabin stock was issued to Mutual Gold and 50% plus one share to Garbutt [Finding XXXII, Tr. 198]. Log Cabin was organized for the express purpose of acquiring the assets of Mutual Gold and operating the same, it never engaged in any other business and never had any assets except said $10,000.00 and all the assets of Mutual Gold which were subsequently conveyed to it. It was impossible to operate the mine on Log Cabin's capitalization, as all parties well knew [Finding XXIV, Tr. 194]. As will appear from the analysis of the contracts below no further working capital was to be supplied by Garbutt as a firm obligation except $10,000.00

for the next installment payment to the owners. There ultimately was evolved the contract of December 17, 1938 between Mutual Gold, Garbutt and Log Cabin [Finding XXVIII, Tr. 195, 196; Tr. 69.] This contract came before the stockholders on February 1, 1939 without any reference to the same being included in the notice for the meeting or by the management in soliciting proxies therefor [Finding XXIX; Tr. 606, 607]. The stockholders at said meeting directed the officers to execute the contract, this time by a vote well under two-thirds of all shares outstanding [Finding XXIX, Tr. 196; Tr. 428]. No action was taken by the stockholders with respect to the organization of Log Cabin, or the Mutual Gold subscription to the stock of that company [Finding XXI, Tr. 193; Finding XXXI, Tr. 197]. Following the December 17, 1938 contract, at various times up to August 9th of the next year, Mutual Gold and Garbutt executed deeds, assignments and bills of sale to Log Cabin, covering substantially all the assets of Mutual Gold [Finding XXX, Tr. 197; Tr. 84, 88, 92, 94, 548].

Garbutt from September 2, 1938 onward was continually in possession and control of the mine, advanced monies for its operation and took out 48,500 tons of ore for which $265,000.00 was received [Finding XXXVIII, Tr. 201].

There need be no confusion because of the successive contracts. It is true the relationship of the parties changed to some degree in their legal aspects as the situation developed. For instance, Garbutt became trustee

for and representative of Log Cabin as soon as it was formed. He was already a trustee for Mutual Gold. However, essentially there was but one transaction commencing with the contract of September 2, 1938, from which he withdrew because of a question of tax liabilitity [Tr. 533, 534], through the contract of December 17, 1938, signed by Mutual Gold about January 12, 1939. This was the most elaborate of the contracts, the one embodying the deal in a form finally satisfactory to Garbutt and the one under which most of Garbutt's activities at the mine took place. That the transaction must be considered as a whole appears by an examination of the contracts and in the substitution of one contract for the other as it suited Garbutt [Tr. 319-322, 325, 327-330].

Analysis of the contracts is of prime importance. This will demonstrate the *ultra vires* of the transaction and facilitate the examination of the remaining points of the appeal.

The September 2, 1938 contract [Tr. 51] was between Mutual Gold and Garbutt. Mutual Gold agreed to sell its said purchase agreement and substantially all its other property to Garbutt, who would organize a corporation and transfer the title thereto, the stock to be issued one-half less one share to Mutual Gold and the balance to Garbutt. He agreed expressly to make the installment purchase payment of $10,000.00 due November 1, 1938 to the owners, and to furnish an additional $90,000.00 as needed to equip the mine and make additional advances, all *at his option,* reimbursing himself out of profits or

funds available from operation. It is to be noted particularly that Garbutt is given the *express option to terminate his liability at any time after paying the first $10,000.00*. This contract was re-executed on September 22, 1938.

The contract of November 1, 1938 [Tr. 66] appended to a cancellation notice of the September contract [Tr. 65], recited that money had been advanced, including $11,000.00 for a power line. Garbutt undertook to pay the $10,000.00 falling due on November 1st, and to advance money for machinery or otherwise, *at his option.* Mutual Gold agreed to give notes and Garbutt to hold in trust titles to the property conveyed to him as security. If Mutual Gold should organize a corporation to take over the property, Garbutt agreed to transfer the property to such corporation, subject to his claim and a pledge of the stock. This agreement served merely as a stopgap and the principal contract, which is the one now purportedly in effect, is that of December 17, 1938.

This December 17, 1938 contract [Tr. 69] is between Mutual Gold, Garbutt and Log Cabin, recites that the September agreements provided for transfers in trust and to facilitate transfer to a corporation to be formed, and that the agreement of November 1, 1938 fixed the status of the parties. Mutual Gold agrees to purchase the stock of Log Cabin for cash and at the option of Log Cabin to sell to it all its assets for $10.00 and other benefits set forth, subject to Garbutt's claims. Mutual Gold acknowledges that Garbutt holds the titles to secure

the payments of monies advanced or to be advanced and to transfer the assets to Log Cabin. Mutual Gold grants Garbutt an option to purchase 5001 shares of the Log Cabin stock out of a total of 10,000. Garbutt agrees to loan to Log Cabin a minimum of $95,000.00, including present obligations of Mutual Gold to Garbutt, subject to his absolute right in paragraph 11 to terminate the contract at any time and avoid payments not yet made [Tr. 78]. If the contract should be completed and the option for 5001 shares exercised, the obligations should become the obligations of Log Cabin to be repaid out of profits from operations or a sale of the property. Garbutt agrees to proceed to equip the mine and *at his option* to take care of future payments to the owners, *at his option* to advance monies in excess of the $95,000.00. *In said paragraph 11 it is expressly stated that he may termine the contract at any time* and that liability for future advances ceases and the stock returns to Mutual Gold when his advances shall be repaid. Other provisions deal with the matter of his security and repayment and Garbutt's protection from personal liability for errors of judgment or for failure to perform.

In a word Garbutt could withdraw at will and say "Pay the bills I have run up."

None of the contracts make any provisions for taking care of Mutual Gold's creditors.

Specification of Errors.

I.

THE DISTRICT COURT ERRED IN HOLDING THAT THE SO-CALLED EXCHANGE CONTRACTS AND INSTRUMENTS ARE VALID AND LEGAL AND AUTHORIZED BY THE LAWS OF THE STATE OF WASHINGTON AS STATED IN CONCLUSION OF LAW VI [TR. 204] AND CONCLUSION OF LAW II [TR. 203].

II.

THE DISTRICT COURT ERRED IN FINDING THAT NONE OF THE ACTS COMPLAINED OF WERE PERFORMED TO EVADE OR CIRCUMVENT THE LAW OR ANY CONTRACT OR OBLIGATION OF MUTUAL GOLD CORPORATION, OR TO INJURE THE STOCKHOLDERS OR CREDITORS OF MUTUAL GOLD CORPORATION, OR JEOPARDIZE OR INTERFERE WITH THEIR RIGHTS AS STATED IN FINDING OF FACT XXXIX [TR. 201] AND CONCLUSION OF LAW III [TR. 203].

III.

THE DISTRICT COURT ERRED IN HOLDING THAT THERE WAS ADEQUATE CONSIDERATION FOR SAID SO-CALLED EXCHANGE AND THE EXECUTION OF SAID CONTRACTS AND INSTRUMENTS, AS STATED IN CONCLUSION OF LAW VI [TR. 204.]

IV.

THE DISTRICT COURT ERRED IN HOLDING THAT THE TRANSFER OF SUBSTANTIALLY ALL THE ASSETS OF MUTUAL GOLD CORPORATION, WAS AND IS AUTHORIZED BY THE ARTICLES OF INCORPORATION OF MUTUAL GOLD CORPORATION, AS STATED IN CONCLUSION OF LAW II [TR. 203].

V.

THE DISTRICT COURT ERRED IN HOLDING THAT MUTUAL GOLD CORPORATION DID NOT BY SAID TRANSACTION PUT IT OUT OF ITS POWER TO PAY ITS OBLIGATIONS OUT OF NET PRODUCTION RECEIPTS AND DID NOT JEOPARDIZE OR INTERFERE WITH THE RIGHTS OF ITS CREDITORS, AS STATED IN CONCLUSION OF LAW III [TR. 203.]

VI.

THE DISTRICT COURT ERRED IN FINDING THAT THE PURPOSE AND INTENT OF THE CONTRACT OF SEPTEMBER 2, 1938, RE-EXECUTED ON SEPTEMBER 22, 1938, AND THE CONTRACT OF DECEMBER 17, 1938, WAS THAT OUT OF THE NET PROCEEDS FROM SAID MINING PROPERTY, MUTUAL GOLD CORPORATION WOULD PAY ALL ITS OUTSTANDING INDEBTEDNESS, AND THAT THE AGREEMENT OF AUGUST 23, 1939 [EXHIBIT J] WAS EXECUTED SO THERE MIGHT BE NO QUESTION OF SAID INTENTION AS STATED IN FINDING XXXVII [TR. 200], AND IN NOT FINDING THAT NO PROVISION WAS MADE FOR THE PAYMENT OF THE CREDITORS OF MUTUAL GOLD CORPORATION.

VII.

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT SAID TRANSFER AND CONTRACTS WERE VOID AS IMPAIRING THE OBLIGATION OF THE CONTRACTS OF THE STOCKHOLDERS AND CREDITORS OF MUTUAL GOLD CORPORATION IN VIOLATION OF SEC. 10 OF ARTICLE I OF THE CONSTITUTION OF THE UNITED STATES, AND SEC. 23 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

VIII.

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT SAID TRANSFER AND CONTRACTS WERE VOID AS DEPRIVING THE STOCKHOLDERS AND CREDITORS OF MUTUAL GOLD CORPORATION AND MUTUAL GOLD CORPORATION OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND SEC. 3 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF WASHINGTON.

IX.

THE DISTRICT COURT ERRED IN HOLDING THAT SAID TRANSFER WAS AND IS AUTHORIZED BY THE STOCKHOLDERS OF MUTUAL GOLD CORPORATION, AS STATED IN CONCLUSION OF LAW II [TR. 203].

X.

THE DISTRICT COURT ERRED IN HOLDING THAT SAID TRANSFER WAS AND IS AUTHORIZED BY THE DIRECTORS OF MUTUAL GOLD CORPORATION AS STATED IN CONCLUSION OF LAW II [TR. 203] AND IN THE EXERCISE OF THEIR SOUND DISCRETION AS STATED IN CONCLUSION OF LAW IV [TR. 203].

XI.

THE DISTRICT COURT ERRED IN NOT FINDING THAT THE ACTS COMPLAINED OF WERE INDUCED OR INFLUENCED BY BUSINESS COMPULSION ON THE PART OF FRANK A. GARBUTT AND ARE THEREFORE VOID OR VOIDABLE AND ERRED IN FINDING ON THE CONTRARY THAT NO ACT OF MUTUAL GOLD CORPORATION, ITS OFFICERS OR DIRECTORS WAS INDUCED OR INFLUENCED BY ANY DURESS OR COERCION OF FRANK A. GARBUTT, AS STATED IN FINDING OF FACT XL [TR. 202.]

XII.

THE DISTRICT COURT ERRED IN FAILING TO HOLD SAID CONTRACT OF DECEMBER 17, 1938 AND THE TRANSFER OF ASSETS ILLEGAL AND VOID AS A RESULT OF SAID CONTRACT AND TRANSFER HAVING BEEN NEGOTIATED BY FRANK A. GARBUTT AS TRUSTEE FOR MUTUAL GOLD CORPORATION AND AS REPRESENTATIVE OF LOG CABIN MINES COMPANY AND FOR HIS OWN BENEFIT.

XIII.

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT SAID TRANSFER OF ASSETS AND CONTRACT OF DECEMBER 17, 1938, AND ALL TRANSFERS OF SAID ASSETS TO LOG CABIN MINES COMPANY WERE ILLEGAL AND VOID BECAUSE OF THE EXISTENCE OF COMMON DIRECTORS.

ARGUMENT.

Ultra Vires.

Contracts or Other Transactions Which Are Ultra Vires the Powers of a Corporation Are Void.

(a) The laws of the State of Washington govern Mutual Gold and the controversy before this Court.

The case was tried in the District Court upon the theory, which is correct, that the laws of the State of Washington control. The following authorities are cited on this point:

Commonwealth Acceptance Corporation v. Jordan (1926), 198 Cal. 618, 628-30, 246 Pac. 796;

Southern Sierras Power Co. v. R. R. Commission of Calif. (1928), 205 Cal. 479, 271 Pac. 747;

Modern Woodmen of America v. Mixer (1925), 267 U. S. 544, 69 L. Ed. 783;

Turner v. Turner Mfg. Co. (Wisc. 1924), 199 N. W. 155, 157.

(b) Under common law rules in effect in the State of Washington in 1932 Mutual Gold, a Washington corporation, cannot sell all its assets if solvent except by unanimous vote of its stockholders. If insolvent or in a failing condition such unanimous consent is not required but the sale must be for cash.

Under the laws of the State of Washington in 1932 when Mutual Gold was organized there was no provision authorizing the sale of all the assets and no machinery to govern such transfer. Common law rules therefore applied, under which a solvent, going corporation cannot

sell all or substantially all its assets without unanimous consent of its stockholders. Such consent is not required if the corporation is insolvent or in a failing condition, but in such case the sale can be only for cash.

Geddes v. Anaconda Copper Mining Co., 254 U. S. 590, 65 L. Ed. 425, is a leading authority on this point. It involved the sale of all the assets of a mining company to Anaconda Copper Mining Co. for certain shares of stock in the latter corporation, which was ratified at a special meeting of the stockholders by less than a unanimous vote. The transaction was approved because here the stock received had a wide and general market and was held to be equivalent to cash. The Court stated the rules very clearly as follows:

> "It is, of course, a general rule of law that, in the absence of special authority so to do, the owners of a majority of the stock of a corporation have not the power to authorize the directors to sell all of the property of the company, and thereby abandon the enterprise for which it was organized. But to this rule there is an exception, as well established as the rule itself; viz.: that when, from any cause, the business of a corporation, not charged with duties to the public, has proved so unprofitable that there is no reasonable prospect of conducting the business in the future without loss, or when the corporation has not, and cannot obtain, the money necessary to pay its debts and to continue the business for which it was organized, even though it may not be insolvent in the commercial sense, the owners of a majority of the capital stock, in their judgment and discretion, exercised in good faith, may authorize the sale of all of the property of the company for an *adequate consideration,* and distribute among the stockholders

what remains of the proceeds after the payment of its debts, even over the objection of the owners of the minority of such stock. Thomp. Corp., 2d ed., sections 2424-2429; Noyes, Intercorporate Relations, sec. 111; Cook, Corp., 7th ed., sec. 670, p. 217, note.

. . . . . .

"It is next argued that the sale here in controversy is void for the reason that the Alice Company could not lawfully acquire and hold title to the stock in the Anaconda Company in which the consideration for the sale was paid.

"Here again the general rule is that while under the circumstances of this case, a sale of all of the property of a corporation could be authorized by the owners of less than all of the stock, for an adequate consideration, *it must be for money only,* for the reason that the minority stockholders may not lawfully be compelled to accept a change of investment made for them by others, or to elect between losing their interests or entering a new company."

McRoberts v. Independent Coal and Coke Co., C. C. A. 8th Circuit (1926), 15 Fed. (2d) 157, 162, follows the *Geddes* case and succinctly states the rule.

People v. Ballard (1892), 134 N. Y. 269, 32 N. E. 54, 17 L. R. A. 737, is a very strong and persuasive authority where a New York corporation conveyed all its assets, consisting of California gold mines, to a California corporation upon consideration of an agreement to pay the debts of the old corporation and the transfer of certain shares of capital stock in the new company. The Court said on page 59:

"While a corporation may sell its property to pay debts, or to carry on its business, it cannot sell its

property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement, with a majority of nonresident trustees, *for the express purpose of stepping into its shoes, taking all its assets, and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate.* Whether the process by which it was sought to convert the New York corporation into a California corporation is called 'reorganization', 'consolidation', or 'amalgamation', it was the exercise of a power not delegated, and was void. *It was corporate burial in New York for resurrection in California.*"

Mutual Gold did precisely the same thing as this New York corporation. Log Cabin was organized through Mutual Gold's procurement pursuant to contract with Garbutt. It conveyed substantially all its assets to this new corporation, organized for the express purpose of stepping into the shoes of Mutual Gold, taking all its assets and carrying on its business. Log Cabin's directors were nonresident and it was organized under the laws of a different state, thus completing the corporate burial of Mutual Gold. In the case at bar Mutual Gold got even less than the New York corporation, whose debts were paid as part of the consideration.

> "In no case so far as we can find, have the nonconsenting minority been compelled to accept stock in the new corporation, *in the absence of some statute in force when they became stockholders, expressly conferring* that authority. . . ."
>
> *American Seating Co. v. Bullard* (C. C. A. 6th Cir., 1923), 290 Fed. 896, 900.

Theis v. Spokane Falls Gas L. Co. (1904), 34 Wash. 23, 74 Pac. 1004, 1006, cites the rule as expressed in *Cook on Corporations,* Sec. 670, that neither the directors nor a majority of the stockholders have the power to sell all the assets against the dissent of a single stockholder, unless the corporation is in a failing condition. As held by the *Geddes* case, *supra,* in such case the sale can only be for cash. This Court will note here that the District Court stated in its opinion [Tr. 174] that the *Theis* case appears to have been specifically overruled by *Lange v. Reservation Mining & Smelting Co.,* 93 Pac. 208. The *Theis* case turned on the question of the "freezing out" of minority stockholders. The *Lange* case cites the *Theis* case merely to uphold the principle of law that a sale cannot be made where its effect would be to thwart the purposes for which the corporation was organized or destroy the corporation itself, or to "freeze out" minority stockholders. In the *Lange* case the property was sold for cash in nearly the same amount as its original cost. The Court said that the corporation was then in as good a condition so as to proceed with the objects for which it was formed. We submit that this is not a specific or any sort of overruling of the *Theis* case and see nothing in either the *Theis* case or the *Lange* case in contravention of the position taken by appellants herein.

See also:

Garrett v. Reid-Cashion Land & Cattle Co. (Ariz. 1928), 270 Pac. 1044, 1049;

National Association etc. v. United States (Ct. App. D. C. 1923), 292 Fed. 668;

14 *Corpus Juris,* 246, Sec. 2075;

13 *Am. Juris.* 187, Sec. 37.

Inasmuch as the common law rule prohibits the sale of all the assets without unanimous consent of the stockholders of a solvent corporation, or otherwise, if the sale is for cash and the corporation is insolvent or in a failing condition, the ultra vires must exist whether Mutual Gold was solvent or insolvent. The findings are confused in this particular. Finding X [Tr. 184] indicates the company simply needed funds to build a mill. Finding XXXV [Tr. 199] sets forth the debts of the company, a small proporton of which were due and payable. This confusion is immaterial as neither condition of unanimous stockholder approval nor sale for cash is present.

(c) The Washington Act of 1933, passed pursuant to the power to amend corporation laws reserved in the Constitution of the State of Washington, does not control Mutual Gold.

1. Washington follows the minority rule that such a law cannot change or burden the intra-corporation relationship, including said minority stockholder rights relating to sale of assets.

The District Court based its decision erroneously, we submit, upon the alternative proposition that even though the law of 1932 did not authorize the transactions complained of, that the law of 1933 did in Sections 3803-36 Rem. Rev. Stat., hereinafter set forth, and that no vested rights were violated. Washington adopted the general practice of following the suggestion of the *Dartmouth College* case by incorporating into its constitution (Sec. 1, Art. XII) a provision that "all laws relating to corporations may be altered, amended or repealed by the Legislature at any time."

The scope of the power is stated in *Looker v. Maynard ex rel Dusenbury,* 179 U. S. 46, 45 L. Ed. 79, on page 81, in language frequently quoted, as follows:

> "The effect of such a provision, . . . is, at the least, to reserve to the legislature the power to make any alteration or amendment of a charter subject to it, which will not defeat or substantially impair the object of the grant, or any right vested under the grant, and which the legislature may deem necessary to carry into effect the purpose of the grant, or to protect the *rights of the public* or of the corporation, its stockholders or creditors, or to promote the due administration of its affairs."

But such reserved right to alter or amend the corporation laws, and thus the charter of any corporation formed thereunder, has very real limitations. As stated in 12 *Corpus Juris,* Sec. 537, p. 969, the legislature may not under such reserved power divest property or vested rights.

The fountainhead of this rule is the often quoted statement of the United States Supreme Court in *Shields v. Ohio,* 95 U. S. 319, 324, 24 L. Ed. 357, 359, as follows:

> "The power of alteration and amendment is not without limit. The alterations must be reasonable. They must be made in good faith, and be consistent with the scope and object of the Act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration. Beyond the sphere of the reserved powers, the vested rights of property of corporations in such cases are surrounded by the same sanctions and are as inviolable as in other cases."

As said in *Hill v. Glasgow R. Co.* (Cir. Ct. D. Ky. 1888), 41 Fed. 610, at 616:

> "All rights thus acquired, of whatever character, are surrounded and protected by constitutional sanctions and guaranties higher and superior to the legislative power of amendment or repeal."

To the same effect:

> *California Corporation Laws,* 1938 ed. *Ballantine and Sterling.*

The authorities are in conflict as to what rights are vested or of such nature as to require this protection. The *majority* view permits control of the internal management of the corporation so as to burden the stockholders by increasing their liability, diminishing the value of their stock, or changing the stock as to amount, kind and classification. Therefore the majority rule permits turning nonassessable stock into assessable stock, or changing the relative status of classes of stock as in the following cases:

In *Security State Bank v. Sharpe* (Minn. 1927), 212 N. W. 801, an assessment was upheld designed to make good an impairment of capital assets of a Montana bank.

Sommerville v. St. Louis Mining & Milling Co. (Sup. Ct., Mont. 1912), 127 Pac. 464, is a strong case relating to the stock of a mining corporation which recited on its face that it was nonassessable.

Hinckley v. Schwarzschild & Sulzberger Co. (1905), 107 A. D. 470, 95 N. Y. Supp. 357, permitted preferred stock not authorized when the common stock was issued.

These cases seek to justify this interference with the contract of the stockholder by stating it is of public interest or in furtherance of public policy to alter the intra-corporate relationship, thus coming within the rule that limits changes to those of public interest, or those powers which the state has granted. See: *Morawetz, Corporations,* 1097, and 1 *Rose's Notes,* p. 942.

Montana adheres to the majority view. In a case involving the sale of a mine, to wit, *Allen v. Ajax Mining Co.* (Supreme Ct., Mont., 1904), 77 Pac. 47, the National Property and Development Company, a going concern, purchased all the property of the Ajax Mining Company, paying therefor forty per cent of its capital stock. The Court held that although at the time of the formation of the Ajax Company the majority stockholders could not dispose of the assets, that the law existing at the time of the transfer so permitting was lawfully adopted pursuant to the reserve power. It said that the test was that if the regulation for the management, operation or control of the corporation could have been inserted upon its organization, it could be engrafted upon the company later.

In *Germer v. Triple-State Natural Gas & Oil Co.* (Supreme Ct. of Appeals, W. Va., 1906), 54 S. E. 509, the selling corporation received one-third of the stock and the purchasing corporation paid off obligations of the selling corporation and in addition issued stock for working capital. The Court held that the sale fell within the majority rule, citing *Allen v. Ajax Mining Co.,* 77 Pac. 47, and cases dealing with assessments.

The *minority* view with respect to assessments and like interference with intra-corporate matters appears in the

long and well-reasoned case of *Garey v. St. Joe Mining Co.* (Supreme Ct., Utah, 1907), 91 Pac. 369), where the articles were amended to render the stock assessable. The Court quotes at length from authorities, including the text writers. This case emphasizes the dual contract—that of the state and the corporation and its stockholders, and that between the corporation and its stockholders. It views the act passed under the reserve power as an interference with the very core of contractual relations of the stockholders among themselves.

Other minority view cases are as follows:

Snook v. Georgia Improvement Co. (Supreme Ct., Ga., 1889), 9 S. E. 1104, changing termini of a railroad.

Oneal v. Mann (Supreme Ct., N. Car., 1927), 136 S. E. 379, changing the liability of lands in a drainage district.

Hill v. Glasgow R. Co. (Circuit Ct., D. Ky., 1888), 41 Fed. 610, diverting proceeds of railroad income to a portion of the stockholders.

In *State v. Neff* (Supreme Ct., Ohio, 1895), 40 N. E. 720, Cincinnati college was an institution whose property grew out of private donations. Its control and management and all of its property was placed by statute under the control and management of the University of Cincinnati. The Court held that its property was private as distinguished from public, notwithstanding it administered a public charity and that such property was within the protection of the constitution.

In re Mt. Sinai Hospital (Ct. of App., N. Y., 1928), 164 N. E. 871, 875, holds that subsequent legislation may change the voting rights of the trustees of a charitable

corporation and may be classed with the majority, but we include it with the minority cases in view of the following strong dictum:

> "Appellants are not asserting the right of the corporation to prevent the *transfer of the corporate property* from one board of trustees to another by the creation of a new corporation under a new charter, Ohio ex rel. v. Neff, 52 Ohio St. 375, 40 N. E. 720; Sage v. Dillard, 15 B. Mon. (Ky.) 340, 360; Regents of University of Maryland v. Williams, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72, *for no such transfer is attempted.* . . . The voting power was exercised by the members for the benefit of the corporation. Appellants have no beneficial interest of their own to protect (Matter of Morse, 247 N. Y. 290, 303, 304, 160 N. E. 374, 378); . . ."

Moore v. Los Lugos Gold Mines (1933), 172 Wash. 570, 21 Pac. (2d) 253, involved stock of an old company, which was nonassessable, transferred for stock in a new company which was assessable. This case upholds the minority view and applies it to the transfer of assets, and is fully analyzed below.

The minority rule in dealing with the sale of assets is vigorously set forth in the case of *Garrett v. Reid-Cashion Land & Cattle Co.* (1928), 34 Ariz. 245, 270 Pac. 1044, which is extensively quoted by the Washington court in *Moore v. Los Lugos, supra.* This case involved the transfer of all the corporate assets and held that this could not be accomplished without unanimous stockholder consent, saying on page 1049:

> "If the law at the time one becomes a stockholder in a corporation does not invest the majority of the stockholders with the power to sell the entire assets of

the corporation, or to exchange its assets for stock in another corporation, and its articles of incorporation do not give such authority, the exercise of it by a majority of the stockholders against a nonconsenting stockholder cannot legally be done."

We turn now to the State of Washington, which follows the minority rule. *Moore v. Los Lugos, supra,* 21 Pac. (2d) 253, is the leading case. This involved changing nonassessable stock to assessable stock. The old company was in financial distress and unable to pay taxes on its Mexican property and other debts. One, Wilson, proposed a transfer to him of all the assets of the old company to be used in the organization of a new company under the laws of the State of Washington, to which new company all the assets should be transferred and it in turn to pay the debts of the old company and a bonus to Wilson. The shares in the new company were to be assessable and were to be exchanged for shares of stock in the old company. The board of trustees unanimously voted to accept this offer. No point was made by the Supreme Court of the failure to obtain unanimous stockholder approval. It went off on the question of the validity, making nonassessable stock assessable. The Court disapproved of the transaction, quoting with approval from the cases of *Geddes v. Anaconda Copper Mining Co.,* 254 U. S. 590, 65 L. Ed. 425; *Theis v. Spokane Falls Gas Light Co.,* 34 Wash. 23, 74 Pac. 1004, 1006; *Whicher v. Delaware Mines Corp.* (Idaho), 15 Pac. (2d) 610, 612; *Garrett v. Reid-Cashion Land &*

Cattle Co., 34 Ariz. 245, 270 Pac. 1004; and *People v. Ballard,* 134 N. Y. 269, 32 N. E. 54, 59, 17 L. R. A. 737. The Court said on page 259:

> "The trustees of the old and the new companies were powerless to assess the nonassessable shares of stock of the stockholders of the old company. *In fact, a statute authorizing assessments to be made on that stock would be invalid.* 'It may be laid down as a rule that a statute authorizing assessments to be made on existing full paid stock is unconstitutional and void as to existing stockholders. This is on the theory that the existing laws become a part of the stockholder's contract of subscription, and that this contract cannot be impaired by any subsequent legislation.' "

The Supreme Court of Washington by approving the *Garrett* case, *supra,* and quoting the language we have quoted *supra* therefrom, adopted the minority view with respect to transfer of assets as well as in stock assessment and the like.

2. The 1933 Act does not apply because Mutual Gold has not amended its articles as required by the Act itself in order to render the section covering sale of assets applicable.

If it could be held contrary to our contention that the reserved power to amend sustains the 1933 Act as against the rights of the stockholders, and creditors, we confidently submit that still the act is not applicable because Mutual Gold did not amend its articles to include the

provision authorizing sale of all the assets. That section is 3803-36, *Remington Revised Statutes,* as follows:

> "1. A voluntary sale, lease or exchange of all the assets of a corporation may be authorized by it upon such terms and conditions as it deems expedient, including an exchange for shares in another corporation, domestic or foreign.
>
> "2. If the corporation is able to meet its liabilities then matured, such authorization shall be given at a meeting of shareholders, duly called for the purpose, and by such vote of the shareholders as may be provided for in the articles of incorporation or, if there be no such specific provision, then by the vote of the holders of two-thirds of the voting power of all shareholders. If the corporation be unable to meet its liabilities then matured, such authorization may be given by the vote of the board of directors.
>
> "3. This section shall not be construed to authorize a conveyance or exchange of assets which would otherwise be in fraud of corporate creditors or of minority shareholders or shareholders without voting rights. (L. '33, Sec. 36, p. 798.)"

Said section is entirely new. It is not in the Washington laws as previously existing and it is a radical departure from and contradiction to the common law rule. The section is immediately followed by Sec. 3803-37 as follows:

> "1. A corporation may, at meeting of the shareholders duly called *upon notice of the specific purpose,* and *in the manner herein provided,* amend its articles in any respect so as to *include any provision authorized by this act,* or so as to extend the period of its duration for a further definite time or perpetually.

"2. An amendment changing the name of the corporation may be adopted by the vote of the holders of a majority of the voting power of all shareholders, or by such vote as the articles of incorporation require.

"3. An amendment altering the articles of incorporation in any other respect may be adopted by vote of the holders of two-thirds of the voting power of all shareholders, or by such vote as the articles of incorporation require.

"4. If an amendment would make any change in the rights of the holders of shares of any class, or would authorize shares with preferences in any respect superior to those of outstanding shares of any class, then the holders of each class of shares so affected by the amendment shall be entitled to vote as a class upon such amendment, whether by the terms of the articles of incorporation such class be entitled to vote or not, and, in addition to the vote required by subdivision 3 of this section, the vote of the holders of two-thirds of the shares of each class so affected by the amendment shall be necessary to the adoption thereof.

"5. Any amendment which might be adopted at a meeting of (a) shareholders as provided in this section, may be adopted without such a meeting being held if written consent to the amendment has been given by all shareholders entitled to vote thereon as provided in this section. (L. '33, Sec. 37, p. 798.)"

If all the provisions of the 1933 Act were automatically included in the charters of preexisting corporations, including a new and radical departure such as Section 36, then Section 37 would be meaningless. Permission is

given to any corporation to amend its articles so as to "include" any provision authorized by the new act. This has no reference to changing or abandoning a contrary portion of the articles but uses the word "include" meaning thereby that where the articles do not already contain any given provision of the new act the same may be added by amendment. The legislature in effect has thereby said that the rights of the stockholders shall not be changed in this vital particular unless two-thirds of them determine to take advantage of the new provision. Mutual Gold could not therefore sell its assets by two-thirds vote of its stockholders or by vote of its directors. The sale itself, even though it might be by a two-thirds vote of the stockholders, as was the purported authorization of the September 2, 1938 contract, is of course not equivalent to such amendment.

Acceptance of an amendatory provision is essential particularly when, as in the Washington law, it is expressly required. The only exception is in the case of amendments relating to police power or eminent domain. The state can no more compel corporations to accept an amended charter than it could compel them to accept the original charter. Acceptance of some of the powers only is properly authorized by an amendatory act.

18 *Corpus Juris Secundum,* pp. 475, 476, Sec. 81a.

3. The remedy given by the 1933 Act to dissenting stockholders cannot be forced upon them and render a void act valid.

The District Court seeks to justify the applicability of the Act of 1933 in its opinion at transcript 173 by stating that if the plaintiffs in the case are dissatisfied with a

resolution they had their remedy under Sec. 3803-41, *Rem. Rev. Statutes,* which provides for the valuation of shares and the payment thereof to a dissenting minority. This we submit is tantamount to saying that the 1933 Act is lawful simply because it gives a remedy to the minority. Such remedy could not make legal a section to be tested by constitutionality and other measuring sticks. If the right is vested the legislature cannot take it away and give something in its place. In any event the remedy would be unavailing and insufficient. Cash was not involved in Mutual Gold's transaction and a judgment against that corporation, pursuant to the provisions of the section would be a highly speculative advantage and would probably produce nothing as the shares of Log Cabin were not equivalent to cash.

Not Only Was the Transaction Not for Cash or Its Equivalent, but the Consideration Was Wholly Inadequate.

As so aptly stated in *Whicher v. Delaware Mines Corp.* (Idaho, 1932), 15 Pac. (2d) 610,

> " 'To otherwise dispose of' does not signify and include 'to give away'. . . ."

This case is quoted at length and with approval in *Moore v. Los Lugos, supra,* 21 Pac. (2d) 253.

Geddes v. Anaconda Copper Mining Co., supra, 65 L. Ed. 425, 431, emphasizes the necessity of adequate consideration.

That Mutual Gold got nothing tangible or adequate through stock ownership in Log Cabin is clear when we consider that Log Cabin could not operate the mine on

its capitalization and was nothing more or less than Garbutt. It was virtually his *"alter ego"*. He organized it, selected the majority of its directors at all times, was promoter, principal creditor, manager, majority stockholder and trustee [Findings XX, XXIII, Tr. 193, 194]. It had no assets from its organization on October 18, 1938 to March 10, 1939 [Finding XXX, Tr. 197]. From September 2d to November 1, 1938, he operated for himself, then for Mutual Gold until the December 17, 1938 contract went into effect [Tr. 761], and then for Log Cabin. Under the September 2, 1938 contract he had the right to fix the capitalization and he did so at the low figure of $10,000.00. It was so completely Garbutt's creature that, during the period of his operation of the mine and even after Log Cabin was organized, he did not take the trouble to make any distinction in his records as to who was operating, whether Mutual Gold, Log Cabin, Garbutt as trustee, or otherwise [Tr. 558, 377]. His bank accounts were likewise subject to the same confusion. His superintendents were paid by personal checks [Tr. 374, 389]. During the entire operation $100.00 a month expense was charged for office work without any segregation as between regimes. Again, he regarded Log Cabin as himself, and himself as Log Cabin, in connection with the quiet title suit in Los Angeles County, brought by Log Cabin, which he engineered to bolster the title to the purchase contract, even planning who should be parties to the action. This followed a quiet title suit commenced in the State of Washington by A. P. Bateham, chairman of the stockholders' protective committee. In the Bateham suit, Grill and two other directors of Log Cabin Mining Co., who stood with Garbutt, had resigned from the board of directors of Mutual

Gold so that they could not be served with process [Tr. 482, 483] and the Bateham suit did not go to judgment. The correspondence between Garbutt and Grill and testimony relating thereto and to the Garbutt quiet title suit appears at transcript pages 470-483, 554, 601-603. Mutual Gold's decision not to contest this action was put over hurriedly by the board of directors with no debate [Tr. 658] and with some confusion as to whether it was brought by Garbutt or Log Cabin [Tr. 659]. The resolution to make no defense referred to "the action of Mr. Garbutt brought to quiet title to said claims in the Log Cabin Mines Company" [Tr. 659]. Thus Log Cabin had practically nothing but the gold mine, was Garbutt's creature corporation and Garbutt undertook virtually nothing except as he might determine to be advantageous.

Moore v. Los Lugos, supra, 21 Pac. (2d) 253 also gives the *coup de grace* to another early Washington case relied upon by the District Court in the case at bar as authority, namely, *Pitcher v. Long Pine-Surprise Consolidated Mining Co.* (1905), 39 Wash. 608, 81 Pac. 1047. The District Court quotes from this case at transcript 175-176. The Washington Supreme Court distinguishes this case in *Moore v. Los Lugos,* at page 263, in the following words:

> "Pitcher v. Lone Pine-Surprise Consolidated Mining Co., 39 Wash. 608, 81 P. 1047, 1049, cited by respondents in support of their position, and upon which the trial court relied, is not in point. *All that was held in that case* was that one, who, after a corporate sale of property, purchased for not more than $25 shares of stock of the corporation making the sale, would not be permitted to maintain an action to set aside that sale. We said: 'It is urged by respond-

ents that appellant has no standing that permits him to question the sale of this property. He was not a stockholder at the time of the transactions complained of. He bought the stock he now has for the evident purpose of bringing this action."

In this connection we call the Court's attention to *Logie v. Mother Lode Copper Mines* (1919), 106 Wash. 208, 179 Pac. 835, characterized by the District Court as authority for its decision [Tr. 174]. This case was called to the Court's attention in *Moore v. Los Lugos, supra,* and overruled in the following language:

> "In Logie v. Mother Lode Copper Mines Co., 106 Wash. 208, 179 Pac. 835, 839, the mining company was authorized by its articles of incorporation to purchase and acquire real and personal property, and to sell and alienate the same. We held that, under the statute (Rem. Code, 1915, Sec. 3684) authorizing a corporation to acquire, by purchase or otherwise, and to own, hold, sell and transfer shares of stock of any other corporation, the corporation might sell all, or substantially all, of its corporate property and lawfully receive, in consideration therefor, stock in another corporation. *The adequacy of the consideration was not questioned. No constitutional question was raised.*"

A little further on, at page 264, the Washington court, crushing in plain words any lingering faith that might otherwise be pinned on the *Logie* case, took occasion to say:

> "It may be that language in some of our opinions permits of interpretation favorable to the position of the respondents. If so, those cases are overruled in

so far as aught appears therein sustaining or tending to justify transactions like those out of which this action arose."

Not only is *Logie v. Mother Lode* overruled by *Moore v. Los Lugos,* but its facts are a clear basis for distinction. The language above quoted itself suggests the distinguishing feature in these words:

"The adequacy of the consideration was not questioned. No constitutional question was raised."

In the *Logie* case, decided in 1919, there was a sale of substantially all the assets of the Mother Lode Copper Mines Co., a Washington corporation, whose articles authorized it to acquire, hold, or alienate its properties in the same manner and to the same extent as any actual or artificial person and to own stock in other corporations. Its mining properties were about fourteen miles from railway transportation to the Alaskan coast, the inland termination of which line was the location of the Kennecott Mines owned and operated by the Kennecott Copper Corporation. This latter company had a large, well-equipped concentration plant and was separated from the defendant's claims by a high mountain range. Defendant had no means of transportation except to truck fourteen miles to the railroad and it had no concentration plant. It could not develop its properties adequately without concentration and cheaper transportation. It did not have sufficient means to meet such expenditures and owed substantial sums in addition to a bonded indebtedness. A contract between the defendant and one Birch, the president of the Kennecott Copper Corporation was entered into whereby a new corporation was to be organized, the

defendant to convey its properties to the new corporation subject to its bonded indebtedness, in consideration of which 1,225,000 shares of the new company would be issued to the defendant and 1,275,000 shares to Birch, or to his nominees, said stock constituting all the stock of the new corporation. The further consideration was that Birch should contemporaneously deliver the $550,-000.00 necessary to redeem defendant's outstanding bonds, pay organization and taxation expenses and a further sum not exceeding $1,000,000.00 as in the judgment of Birch (exercisable of course in good faith) might be necessary for sufficient working capital, and the new company was to have the benefit of the same smelting, refining, freight and selling charges as the Kennecott Copper Corporation.

The difference between these facts and those at bar are sweeping. Mutual Gold's outstanding indebtedness, including production notes, are not paid off, no advantages of transportation, concentration or other operative matters accrue to Mutual Gold except as they might follow the advancement of money at the whim and caprice of Garbutt, who might at any time withdraw from the contract. The theory of the plaintiff below, which is reflected in the opinion of the District Court [Tr. 170-178] is that the contract should be upheld because it was a favorable contract, or at least worked out favorably, as the defendants allege, for the old corporation Mutual Gold. But the failure of consideration must be determined at the time it was made and not in the light of subsequent events. Suppose he had paid the $10,000.00 and immediately withdrawn. Could any one contend that Mutual Gold had received an adequate consideration for the complete loss of its valuable mine, which under the low valua-

tions alleged in Garbutt's answer had 63,500 tons of ore worth $650.000.00 then developed and $68,000.00 of other assets [Tr. 123, 124], and out of which subsequently came 48,500 tons worth $265,000.00 [Finding XXXVIII, Tr. 201]. As stated in *Citrus Growers Development Association v. Salt River V. W. Users Assn.* (Ariz., 1928), 268 Pac. 773, at 776:

> "Neither can the fact that the alteration is beneficial give the majority the power to accept it against the dissent of the minority."

The Court will also note the following case which disregards the supposed advantage to a corporation in the face of the violation of constitutional guarantees.

> *Irving Trust Co. v. Deutsch* (1932), 2 Fed. Supp. 971; 73 Fed. (2d) 121 (2d Cir.)

The majority view cases above cited involving sales of assets, namely, *Germer v. Triple-State Natural Gas & Oil Co.,* 54 S. E. 509, and *Allen v. Ajax Mining Co.,* 77 Pac. 47, likewise may be distinguished on the facts in view of a substantial consideration accruing therein to the selling corporation.

In the *Germer* case, the new corporation issued $3,000,000.00 in a consolidated mortgage on the property the company acquired and the new company agreed to discharge all liabilities, contracts and obligations of the selling corporation, including issuance of certain new bonds to take up the old. Certain of the bonds and stock of the new corporation were to be sold for the substantial sum of $1,249,000.00 in cash into the treasury of the new company. In *Allen v. Ajax Mining Co.,* the old company was to receive only forty per cent of the capital stock of the new company.

(d) The new legislation may not authorize such a fundamental change in the charter of a corporation as here attempted.

The new legislation may not authorize such a fundamental change in the charter of a corporation as to divert it from its original contract and purposes.

18 *Corpus Juris Secundum* p. 477, Sec. 81b (3).

McKenzie v. Guaranteed Bond & Mortgage Co. (Ga., 1929), 147 S. E. 102, involved an increase of stock of a bond and mortgage company. This, said the Court, without consent of all the stockholders, would make them members of an association to which they had never consented and that even distribution of stock pro-rata would often work injustice because many of the stockholders might be unable to take their respective shares.

See also:

Macon Gas Co. v. Richter (Ga., 1915), 85 S. E. 112.

In re Mt. Sinai Hospital, supra (N. Y. 1928), 164 N. E. 871, 874, states the rule as follows, quoting from the Supreme Court of the United States:

> "Any alteration may be made 'which will not defeat or substantially impair the object of the grant, or any rights * * * vested under it, and which the legislature may deem necessary to secure either' that object 'or any public right' or 'to promote due administration of the affairs of the corporation'. Tomlinson v. Jessup, 15 Wall. 454, 21 L. Ed. 204; . . .

'The alterations (under the reserved power) must be reasonable; * * * and be consistent with the scope and object of the act of incorporation.' Shields v. Ohio, 95 U. S. 319, 324 (24 L. Ed. 357); . . ."

(e) The Garbutt contracts are void because no provision is made to take care of the creditors of Mutual Gold.

An examination of the various contracts with Garbutt show that no provision was made for creditors of Mutual Gold. This was deliberate. It was discussed with Garbutt as to whether the September 2d agreement should take care of the situation and it was decided to make no provision for creditors [Tr. 467, 468].

The creditors of Mutual Gold and the amounts owing are set forth in paragraph III of plaintiff's bill of particulars [Tr. 105-110 and Finding XXXV, Tr. 199]. The claims were $30,000.00 by way of production notes and in excess of $25,000.00 on open accounts, in addition to the installment of $10,000.00 due on the purchase price November 1, 1938.

At the eleventh hour and long after the transactions complained of, to wit, on August 23, 1939, which was the eve of the trial of certain lawsuits in the State of Washington brought by Vance and others against Mutual Gold, upon open accounts and production notes, a contract was made between Mutual Gold, Garbutt and Log Cabin providing that after repayment of the amounts advanced by Log Cabin and other expenses, the net proceeds accruing to Mutual Gold should first be paid to discharge said indebtedness. This contract may be disregarded so far

as the question of *ultra vires* in connection with creditors is concerned because it was executed long after the contracts and other transactions complained of and falls far short of achieving any desired end so far as creditors are concerned. The only way Mutual Gold could have any money to devote to creditors would be through dividends on its minority interest, and Log Cabin as controlled by Garbutt, might or might not declare such dividends.

The assets of an insolvent corporation are a trust fund for its creditors and stockholders. *Wells & Wade v. Unity Orchards Co.* (1936), 186 Wash. 198, 204, 57 Pac. (2d) 1050, 1052. At page 1052 the Supreme Court of Washington said:

> "The law is well settled that, in the reorganization of a corporation—no judicial sale of respondent's property was ordered—such as that attempted in the case at bar, *each creditor has superior rights against the stockholders of the corporation* . . .
>
> ". . . Section 63, p. 814, of the act clearly states that the legislature did not intend that the act should affect or impair any liability acquired prior to its enactment." (Italics ours.)

Jones v. Francis (1912), 70 Wash. 676, 127 Pac. 307, which cites *Northern Pacific R. Co. v. Boyd* (1913), 228 U. S. 482, 57 L. Ed. 931, the leading Federal case on the protection of creditors.

In *Hill v. Brandes* (1939), 1 Wash. (2d) 196, 95 Pac. (2d) 382, it was said at 384:

> "A domestic corporation cannot after insolvency prefer one or more of its creditors. Its property is, after insolvency, regarded as a trust fund for all of its creditors, and any payments or transfers of prop-

erty made after insolvency, which have the effect of preferring one creditor over another are void . . ." (Citing cases.)

Moore v. Los Lugos, supra, 21 Pac. (2d) 253, at 264 dismissed cases cited against the Court's position with the following statement:

> "All of the cases cited however, presuppose a valid sale for the purpose of paying the indebtedness of the corporation."

(f) The acts complained of cannot be confirmed. To do so would impair the obligations of the contracts of stockholders and creditors of Mutual Gold and deprive them and the corporation of property without due process of law.

If this Court were to confirm the acts performed or attempted to be performed whereby Mutual Gold was deprived of its assets, it would impair the obligation of contracts of the stockholders and creditors in violation of Sec. 10 of Art. 1 of the United States Constitution and of Sec. 23 of Art. I of the Washington Constitution. It would deprive them also of their property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution, and Sec. 3 of Art. 1 of the Washington Constitution. Additional cases on the constitutional doctrine are as follows:

Coombes v. Getz (1932), 285 U. S. 434, 76 L. Ed. 866;

Ettor v. Tacoma (1913), 228 U. S. 148, 156, 57 L. Ed. 773, 778.

In the *Coombes* case, *supra,* the action was brought by creditors against directors for embezzled monies. Pending appeal the constitutional provision was repealed. The Supreme Court of the United States held that such repeal could not divest plaintiffs of their cause of action and to hold otherwise would be a violation of Section 10 of Art. I and of the due process clause of the Fourteenth Amendment. The *Ettor* case, *supra,* contains a similar ruling in connection with a statute of the State of Washington requiring municipalities to compensate for consequential damages arising out of condemnation proceedings.

(g) The transactions are void since they turn the corporation into a shell and result in an abnegation of its powers.

Passing the question of reserved power to amend or the applicability of the 1933 Act, we will examine the nature of the transaction for its effect upon the corporation as such. The facts do not need reiteration here. Suffice it to remind the Court that before the transaction Mutual Gold had a valuable mine, thereafter it had no control of its property and had divested itself of the title. It had virtually ceased to function. The sale of the assets in any event could not be upheld if it amounts to a device to turn the corporation into a shell and abrogate its powers.

Ultra vires is something more than the violation of express provisions of law. As was said in *State v. Corning State Savings Bank* (Supreme Ct., Iowa, 1907), 113 N. W. 500, 503, where it is said:

> ". . . *ultra vires* contracts of a corporation are . . . contracts not positively forbidden, but impliedly forbidden, because not expressly or impliedly authorized."
>
> *Barry v. Interstate Refineries* (D. Ct. W. D., Mo. W. D., 1926), 13 Fed. (2d) 249.

The charter of a corporation such as Mutual Gold is a measure of its powers, and enumeration of certain powers implies the exclusion of all others. *Thomas v. West Jersey Railroad Co.* (1880), 101 U. S. 71, 81, 82, 25 L. Ed. 950, 951, 952; *Thompson on Corporations* (3d ed), Vol. 3, Sec. 2175.

From *Moore v. Los Lugos Gold Mines, supra,* 21 Pac. (2d) 253, it appears that the authority vested in the board of trustees does not extend beyond the management of ordinary corporate affairs.

In 19 *Corpus Juris Secundum* at page 669, it is said:

> "In the absence of express authorization, a corporation cannot transfer all of its property to another corporation for the purpose of enabling the transferee to exercise its powers and control its affairs."

In point under the above heading is the following from *Seattle Investors Syndicate v. West Dependable Stores, etc.* (1934), 177 Wash. 125, at 127, 30 Pac. (2d) 956, at p. 957, col. 2:

> "As appears, the appellant purchased the capital stock and assets of the Red Robin Stores, operated

the business thereafter, and paid the stockholders of the Red Robin Stores in stock of the new corporation. *The Red Robin Stores, while its corporate existence was not destroyed was nothing more than a shell.*" (Italics ours.)

In *McCutcheon v. Merz Capsule Co.* (C. C. A. 6th Cir., 1896), 71 Fed. 787, the Court stated, on page 793:

> "The avowed object was to continue corporate life and activity through the instrumentality of another corporation. There was to be a corporation within a corporation. Individual activity was to cease, but corporate energy was to be exercised through a living corporation, whose life and functions were to be controlled through the shares held by its corporate creator and master. . . . The effect of this action of the appellee was to divest itself of the power to exercise the essential and vital elements of its franchise, by a renunciation of the right to engage directly and individually in the *very business* which it was organized to carry on, and is a disregard of the conditions upon which corporate existence was conferred."

See also:

People v. Ballard, supra, 134 N. Y. 269, 32 N. E. 54.

In this connection we refer to the case of *Child v. Idaho Hewer Mines* (Wash., 1930), 284 Pac. 80, cited by the District Court at transcript 175 as sustaining its holding. This case is clearly distinguishable on its facts. It deals with assessment of stock pursuant to express power included in the articles and the by-laws and on the face of the stock certificate itself. It is true that the articles

of Mutual Gold permit the sale or exchange of corporate property in general terms. However, they do not provide for, nor in any manner permit, the sale of all the assets in contravention of common law principles protecting vested rights, nor for the grossly inadequate consideration of $10,000.00 plus Garbutt's unilateral undertaking; particularly since the corporation loses the control and management of its assets, all of which constitutes an abnegation of its foundamental purposes.

(h) The articles of Mutual Gold do not contain any authorization of the transaction complained of.

The District Court in its opinion [Tr. 175] reads into sub. (b) Article 2 of the Articles of Mutual Gold giving the right "to sell, exchange, lease or in any other manner dispose of the whole or any part thereof" [Tr. 210], authority to make the transfer in question. This language is very general and cannot be held to authorize anything other than a valid sale pursuant to legal principles which, as we have seen, was limited by the common law to unanimous stockholder action or a sale for cash.

We have seen that to "otherwise dispose of" does not mean "to give away." *Whicher v. Delaware Mines Corp., supra,* 15 Pac. (2d) 610.

In *Geddes v. Anaconda Copper Mining Co., supra,* 65 L. Ed. 425, 431, the articles gave "authority to buy, sell, lease, hold and operate mines." The Court nevertheless applied the limitations.

Illegality.

The Mutual Gold Transfer of Assets Was Illegal and Void Because No Adequate or Legal Notice Was Given to Stockholders of the Proposed Action.

Irrespective of the *ultra vires* of the transaction the contracts and ensuing conveyances were illegal and void for the reason that the purported authority by Mutual Gold was improperly and insufficiently executed. The notice, the proxy solicited, and the president's letter relating thereto for the stockholders' meeting of August 6, 1938, were defective in that the purpose of the meeting was not stated. A reference to the Vance contract was coupled therein with general language which would authorize the corporation to make any other deal by way of sale or transfer of the assets that the directors in their discretion should determine. This is not notice that the corporation would sell all its assets in the illegal and improper manner that eventuated. The Vance contract provided for the sale of half the assets, payment of creditors, and a firm commitment for financing, and any other contract of the same nature with any other person would not cover a sale of all the assets or for an inadequate consideration or under circumstances including abnegation of corporate functions. After the September 2, 1938 contract was entered into there was no attempt to secure stockholder approval. The meeting called for that purpose was cancelled. The November 1, 1938, contract was not laid before the stockholders.

The contract of December 17, 1938, finally fixed the relationship of the parties and is purportedly in effect today. It took the place of the agreement of November 1, 1938, just as that contract superseded that of September 2, 1938. This contract was purportedly approved by the stockholders but the notice of the meeting held February 1, 1939, contained no mention of this agreement [Tr. 606]. The proxy solicited by the management likewise made no mention of it [Tr. 607].

Section 3 of Article I of the by-laws of Mutual Gold [Tr. 218] specifies machinery for notices *in addition to the notice required by law.* The by-law mentions stating the objects for a special meeting, but Section 3803-27, Remington, Revised Statutes, subsection 4, provides as follows:

> "4. Persons authorized to call *shareholders' meetings* shall cause written notice of the time, place *and purpose* of the meeting to be given all shareholders entitled to vote at such meeting, at least ten days prior to the day named for the meeting."

The December 17, 1938 contract, which expressly took the place of the preceding agreements, was therefore improperly adopted for failure to state the purpose thereof in the call for the shareholders' meeting. The former contract does not come alive. It is familiar doctrine that a previous contract is not revived when the later contract falls to the ground. Pursuant to the December 17th contract Log Cabin obtained its title to the assets and its

stock was issued. This whole transaction is therefore void.

If the stockholders' meetings purporting to authorize a corporate conveyance are held on insufficient notice the conveyance is a nullity.

Hanrahan v. Andersen (Supreme Court, Mont., 1939), 90 Pac. (2d) 494, 500;

Northern Mining Corp. v. Trunz (C. C. A., 9th Cir., 1941), 124 Fed. (2d) 14, citing with approval

Hanrahan v. Andersen, supra.

Even where no notice is required if one is given it has the effect of limiting the business to be transacted.

Synnott v. Cumberland Bldg. Loan Assn. (C. C. A., 6th Cir., 1902), 117 Fed. 379, 384.

Even if no notice is required, when unusual business is to be transacted the notice should state the unusual business.

Dolbear v. Wilkinson (1916), 172 Cal. 366, 156 Pac. 488, quoting 2 *Cook on Corporations* (6th Ed.), Sec. 595.

Business Compulsion.

The Contracts Pursuant to Which Mutual Gold Transferred Its Assets and the Transfer Itself Are Void or Voidable Because Induced by the Business Compulsion of Garbutt.

(a) Garbutt, acting as representative of the owners of the mining claims, forfeited the purchase contract relating thereto and thereby forced and induced Mutual Gold to enter the transactions complained of.

Garbutt, after attempting to get financial help from a former associate, William C. DeMille, pursuant to a contract that Garbutt himself drew, and failing in another direction, decided to take the entire acquisition of the mine himself [Tr. 528-530, 562]. The transcript covers in some detail the negotiations whereby Garbutt secured control and operation of the mine for himself, but it will not be necessary to direct the Court's attention particularly thereto. Directors Collins, Ferbert and Grill, who was also attorney for Mutual Gold, were particularly active. Garbutt had effective assistance from Keily, superintendent at the mine and his intimate associate who went to Washington to see the directors. Keily had received $300.00 per month from Garbutt for seventeen years. Incidentally, Keily gratefully made Garbutt his heir [Tr. 340, 529, 530, 560, 561, 750, 754].

Garbutt represented the owners in negotiating the original sale of the mining claims to the assignors of Mutual Gold, one of whom was Director Collins, and acted in an advisory capacity to the owners from the very

first [Tr. 5, 23, 530, 748, 749]. In this capacity he had an opportunity to keep in touch with the mine [Tr. 529]. In fact he was the agent of the owners with full power to declare a forfeiture of the purchase contract, as was confirmed by the owners themselves on October 3, 1938, in the fourth cancellation notice [Tr. 314].

We thus have the astounding and disturbing sight of an owner's representative negotiating with a purchaser of mining claims which was in trouble, in order to obtain for himself a majority interest in said claims and the operating rights thereto. The power to force the purchaser to deal was at hand and Garbutt proceeded to exercise it.

The first cancellation letter was that of August 25, 1938 [Tr. 278], received at the board meeting of August 27, 1938, at the height of the negotiations, and was an inducement to the contract of September 2, 1938 [Tr. 383, 384]. It is significant that the first paragraph states that "we" have elected to cancel and that the action "is final and absolute". But the second paragraph expresses concern for the stockholders and invites the company to negotiate with the undersigned (Garbutt), "who will give the matter consideration, provided your defaults are cured and other points of difference are adjusted to his satisfaction".

The cancellation letter of September 2, 1938, written on the date of the first contract, is a masterpiece of subtlety. It reiterates the alleged defaults, frankly states that Garbutt, who signs the letter, has been negotiating with Mutual Gold for a contract looking to the operation of the property, but with no desire to undertake such responsibilities, the only consideration being to give the stockholders an alternative to escape the "manifestly tricky and

unfair contract" that Vance was attempting to force upon them. The letter ended with assurance of friendly feelings from both owners and the writer, a statement that the writer's first duty was to the owners whom he represented, and urging the stockholders to proceed against Vance if the forfeiture became effective [Tr. 279-284]. This last threat to force Vance and his associates into line was unsuccessful, but the repeated threats of forfeiture had the desired effect and the contract was signed and subsequently ratified.

The third cancellation letter was dated September 9, 1938, a week after the signing of the first contract [Tr. 288-291]. This was apparently prompted by a letter from Vance declining to accept cancellation and stating that the company had performed its contract. The former cancellation was reiterated, together with a refusal to negotiate until a letter was received giving the reasons for enumerated breaches. Although he had inferentially stated that negotiations would be resumed, he ended the letter with the words "as long as you take this position (that Mutual Gold had performed the contract) there can be no negotiations". The reason for sending this strong letter becomes clear when we remember that the board of directors did not specifically approve the agreement of September 2, 1938, until September 19th. Stimulated by the letter of September 9th, the board at its meeting of September 19, 1938 [Plaintiff's Exhibit 22, Tr. 300-305], read said "last notice of cancellation" and thereupon reconsidered its action of September 7th that the contract of September 2, 1938, be submitted to the stockholders and authorized its execution "if the previous ratification (by the stockholders on August 6th) is not legally sufficient". In a second motion they ratified the contract of September

2, 1938, in view of the authority and power given to the board by the stockholders' meeting of August 6, 1938. Another motion called off the stockholders' meeting of September 24, 1938, and the stockholders were so notified under date of September 20, 1938 [Tr. 299-300].

Garbutt felt very sure of himself during this course of events. The initial money for the power line was furnished perhaps a month before September 2, 1938 [Tr. 551, 552]. Garbutt was so anxious to obtain the contract and so certain he would obtain it that he did not want to risk not getting the power line started that year [Tr. 308, 563]. The $500.00 was advanced for that purpose before the contract with Mutual Gold and with the sword of forfeiture hanging over the company's head [Tr. 309, 763, 764, 766].

Another phase of Garbutt's activity was the loan of expense money for Director Grill's use, who was also an officer, stockholder and attorney for the company. He received $100.00 at one time and $150.00 at another for expenses [Tr. 402, 457, 458]. Garbutt proceeded to take control of the mine, to hire superintendents and to proceed further with his plans. On September 2, 1938, the very day of the second forfeiture letter, Garbutt was at the mine, paying his own expenses [Tr. 399]. Haley, Collins and Sturgeon were employed immediately after Garbutt took charge on September 2, 1938 [Tr. 359, 360, 388, 389, 758, 759], and frequent orders dispatched to them during the month of September, 1938 [Tr. 390-392, 298, 299].

Garbutt was careful not to deal with the stockholders of Mutual Gold. Obviously directors would be fewer and more easily handled. The reporter's transcript below, page 439, line 25, to page 440, line 7 (designated by plain-

tiff in this appeal at transcript page 801, but inadvertently omitted by the printer), is as follows:

> "Q. By Mr. Abel: Mr. Garbutt, did you take any steps to get the approval of the small stockholders to this transaction that is under attack? A. I never dealt with them at all. I dealt with the Mutual board of directors.
>
> Q. Yes. You never took any steps to find out whether small stockholders were satisfied with your deal or not? A. I don't know. I only know what they wrote me from time to time—strangers to me."

As a matter of fact, the minority were kept pretty well in the dark with respect to what was happening [Tr. 669, 670]. The quiet title suit brought by Garbutt did not come to the attention of W. H. Abel, Vance's attorney, and also one of the plaintiffs' and appellants' counsel, until after the case at bar was commenced [Tr. 670]. Plaintiff M. I. Higgens did not learn of it until Thanksgiving, 1939, after it had gone to default [Tr. 725, 736]. Bateham, the very active chairman of the stockholders' protective committee, himself a stockholder, knew nothing of it until after it had gone to default [Tr. 739, 741, 742, 744].

Garbutt took no chances in connection with driving through his cancellation threat. He even went so far as to state that if the full balance on the purchase price of the mine were paid he would not take it [Tr. 386-387]. Truly a strange way to protect the interests of his principal!

The effect of Garbutt's pressure and the key to the various actions of the board appears in President Stiegler's letter of September 12, 1938, to the stockholders, prepared after consultation with the company attorney [Tr. 292-294, 423, 424]. While the negotiations were in prog-

ress, says the president, the notice of cancellation was received from Garbutt. The board members thereupon conferred with Garbutt and obtained the contract, which was ratified, four directors voting in its favor. The gist of the letter is as follows:

> "It was the feeling of the writer, as well as of the other members of the board voting in favor of the contract, that if it was not accepted the company would become involved in long and expensive litigation with the owners of the property over the attempted cancellation of the contract and even though the company were ultimately successful in such litigation, little might remain for the stockholders after the termination thereof." [Tr. 294.]

Then follows an apology for not obtaining a better contract but, said the president, the board felt that the company had no alternative. We have seen, however, that the Vance contract was available and was indeed the only one mentioned in the notice of the stockholders' meeting of August 6, 1938.

Stiegler's attitude was the same after the meeting of September 19, 1938, as it was in the letter of September 12, 1938. In his covering letter enclosing the Garbutt progress report of September 23, 1938, Stiegler writes to the stockholders that the interests of the stockholders in the long run would have a greater value than if any other offer had been accepted "which would have occasioned unending litigation" [Tr. 313-314].

Garbutt, in his progress report of November 22, 1938 [Tr. 333-345], continues to hint broadly about default, referring specifically to tailings [Tr. 334] and stating he could not guarantee what might happen, but that the own-

ers of the mine were disposed to be lenient. He no doubt felt entirely secure as the letter contains no raking over of embers or the usual abuse of Vance. Most of it is taken up with a recital of what developments he has undertaken and either planned or completed.

On September 23, 1938, Garbutt wrote a long letter called a progress report to the board [Tr. 306-312]. This letter refers to a wire from the board of September 19th that his contract had been fully authorized and recites what he has done toward starting up operations and developing the mine, including guarantee of a survey and preliminary work on a power line before September 19th, and thereafter payment of $11,000.00 on the power line, employment of Collins and Haley, and other activities. There is an allusion to his termination of the purchase contract and his concern over the delay in entering into the contract of September 2, 1938, the agreements of the factions of Mutual Gold and the delay in arriving at its final ratification. The plain implication is that the pressure exerted by the forfeiture letters has been successful. Now the contract has been made and "fully authorized" and development work already begun [Tr. 309].

The witness Collins and the District Court both characterized the acts of Garbutt as "putting on the squeeze" [Tr. 414]. The Court's decision, however, did not carry this thought to its proper conclusion.

Garbutt got the approval of the owners to his cancellation. At first they objected to his taking the contract and terminated his authority [Tr. 314-319, 756, 757]. He explains that the forfeiture was withdrawn on October 15, 1938, by a notice from the owners [Tr. 765] because they had become assured that a contract had been made

which would cure the defaults and protect the property. In other words, they acquiesced in the successful culmination of the "squeeze" [Tr. 537].

Some attention is warranted to the nature of the alleged defaults. Garbutt's principal grounds of forfeiture were that Mutual Gold had allowed the 125-foot level to cave, and had wasted and lost the tailings, thereby incurring a damage claim [Tr. 532, 533]. These defaults could not have been very serious. When the purchase contract was reinstated there had been no correction of the so-called breaches. He took the contract as the mine stood and later opened up most of the caving himself, getting in the process some ore [Tr. 533, 552, 553]. The cavein extended for 50 to 60 feet and would cost $500.00 to remove. The mine was generally subject to caving [Tr. 672, 673, 675]. He solved the question of tailings by not taking title to them or the land on which they rested and by ordering his men not to touch them [Tr. 394, 534-536].

(b) Mutual Gold was not required to take the Garbutt deal from necessity as the Vance offer was at the same time available.

There can be no condonation as it were of Garbutt's illegal and improper compulsion. Mutual Gold was not required to take the Garbutt offer from necessity. It had a very real alternative to entering the contract with Garbutt, namely, to deal with Vance. This Garbutt himself admits [Tr. 755]. This fact appears time and again throughout the transcript. While the Vance offer was withdrawn, it was renewed on August 13, 1938 [Tr. 382]. When Garbutt's negotiations were commenced, Vance's offer was on the table and had in effect been accepted by

the board of directors. Vance agreed to make the purchase contract payment, to advance money and to proceed with the management. He had been manager of the mine and was familiar with its needs.

There were thus two persons ready, able and willing to carry on the corporation. At the board meeting of August 6, 1938, Director Ferbert, who always stood with Garbutt, urged the directors to deal with him, saying that Garbutt would take Vance's vehicle and pledge $86,000.00 of his own money "if the deal were turned over to him, and he would guarantee there would be no forfeiture of the contract or any trouble in that respect if he had the deal".

The record is replete with a comparison of Vance and Garbutt and their respective regimes. Appellants have no fear of such comparison of the abilities of Vance and Garbutt. But that is not the point of this case. No matter how able or how well financed a promoter might be, that does not make legal an *ultra vires* transaction, business compulsion or other illegal conduct. *The end does not justify the means, either in morals or in law.*

Nor do appellants fear a comparison of the reasonable and businesslike Vance offer with the oppressive and illegal Garbutt deal.

From the foregoing it is clear that the so-called forfeiture was merely a club to force Mutual Gold into line and to assure Garbutt's hold upon a majority of the board. He flourished it repeatedly and, as it turned out, successfully, while he went serenely on his way in control and possession of the mine, once having secured it. We submit that this was business compulsion at its worst. None of the contracts or conveyances escape this defect. For having obtained the September 2, 1938, contract and con-

veyances thereunder, Garbutt was in the saddle, and as a creditor, operator in possession, and with the majority of the board of Mutual Gold doing his bidding, he went on to the contracts of November 1 and December 17, 1938. The whole course of dealing was of one cloth. All the contracts and conveyances were therefore at least voidable. In support of this contention we cite the following authorities:

The common law doctrine of duress and coercion has been considerably liberalized in modern times so that now it includes "business compulsion"; that is, the coercion exerted requires the other party to execute an agreement on threat of pain of the latter's suffering serious business loss if he does not do so.

See:

17 *Corpus Juris Secundum* 536.

The doctrine was definitely upheld by the Supreme Court of Washington in the following case:

Duke v. Force (Wash., 1922), 208 Pac. 67, 74:

> "It is true that the old and established idea as to the character of duress and coercion necessary in order to constitute a payment involuntary has been greatly modified and relaxed by modern authorities. The tendency of the courts has been, and still is—and with that tendency this court has heretofore shown itself in accord (Olympia Brewing Co. v. State, 102 Wash. 494, 173 Pac. 430; Sunset Copper Co. v. Black, 115 Wash. 132, 196 Pac. 640)—that payments made under what, for lack of a better term, we may call *business compulsion* are to be held to be involuntary payments; that, where a person is called upon either to suffer a serious business loss or to make a

payment, he may recover that payment, when it has been illegally collected, as having been made involuntarily. It is unnecessary to determine absolutely whether the payments here were voluntary or involuntary to arrive at the proper determination of these suits, and we can assume that they were involuntarily made."

In *Ramp Bldgs. Corp. v. N. W. Bldg. Co.* (Wash., 1931), 4 Pac. (2d) 507, the cross-complaint filed by the defendant alleged that he had obtained a patent on certain construction devices; that it was necessary for him to borrow money by mortgagee in order to construct a plant; that the mortgagee was to advance money from time to time and not in a lump sum at the beginning; that plaintiff contended that defendant's patents were an infringement of his and told defendant that if he did not enter into a license agreement with plaintiff, defendant and the mortgagee would be subjected to infringement suits. Plaintiff in fact had notified the mortgagee of his claim of infringement and that he would bring a suit against the mortgagee if the latter made any further advances under the loan to defendant. Plaintiff further told defendant that he would cause the mortgagee to refuse further advances unless defendant entered into the license agreement with plaintiff. If defendant could not get this money it would cause him serious loss, and eventually become bankrupt.

Plaintiff's demurrer to this cross-complaint was sustained. However, on appeal the Supreme Court of Washington reversed the same, holding that defendant had set up a good cause of action under the doctrine of "business compulsion" (citing several cases from the State of Washington).

This case was cited with approval by the Supreme Court of Washington later on in *Marrazzo v. Orino* (Wash., 1938), 78 Pac. (2d) 181, where, however, the Court held that the facts did not bring the case within the "business compulsion" rule.

In *Oswald v. City of El Centro* (1930), 211 Cal. 45, 292 Pac. 1073, plaintiff was a contractor in the construction and improvement of city streets. He had entered into a contract with the city which required that the work should be completed by a certain date. However, it was impossible for plaintiff to complete it within the period, and he asked for a two weeks' extension. The evidence showed that this extension was reasonable because the period in which the improvements were to be completed was merely the result of an estimate made by the street superintendent as to the time it would ordinarily require for a completion of the work. The city, however, refused to grant any extension unless plaintiff would agree to lease to the city for a period of ten years at a nominal consideration of $1.00 per year certain equipment having a value of approximately $26,000.00. The city told him that unless he would execute such a lease he would not get the extension. Plaintiff then executed the lease and brought action to cancel it. The trial court refused cancellation and its judgment was reversed on appeal by the Supreme Court which held that, at page 52:

> "Clearly (the license) was the product of compulsion and the employment of coercive methods by which the exercise of freedom of will, which is always

essential to a valid contract, was unquestionably overcome by officers of the city acting under color of official authority."

Coercion and duress may result where the parties are not at arm's length and where one party is able to dictate to the other:

See:

17 *Corpus Juris Secundum* 536.

In *Davidson v. Bradford* (Iowa, 1927), 212 N. W. 476, 479, the Court referred to a quotation from 13 Corpus Juris 403, reading as follows:

> " 'Where the parties are not at arm's length, but one of them is in a position to dictate, the courts will treat agreements which are influenced by threats of injury to, or withholding of property as made under duress. . . . And the position of a public officer is generally such that persons acceding to illegal exactions on his part may be said to do so under duress.' "

Coercion or duress need not be the result of direct attack but can arise from indirect action.

In *Cochrane v. Nelson* (S. D., 1922), 189 N. W. 700, at 702, the Court said:

> "Coercion may be accomplished by a set of circumstances brought about by designing persons as effectually and as wrongfully as it may be accomplished by direct threats and menace."

Trusteeship.

Garbutt Dealt as a Trustee For Mutual Gold, as a Representative of Log Cabin and for Himself. The Transaction Is Presumed to Be Without Sufficient Consideration and the Attempt to Acquire the Beneficial Title Free of the Trust Is Void.

As has been argued *supra* in this brief, Garbutt was a trustee for Mutual Gold under the contract of November 1, 1938. As promoter of Log Cabin he was likewise its trustee, and as such his acts are subject to rigorous scrutiny. In negotiating the December 17th contract to which he himself was a party, he sat on both sides of the table, representing himself in his own interest, acting as trustee for Mutual Gold and likewise sitting as the representative of his creature corporation Log Cabin. Having dealt therefore with his beneficiary to his own advantage, the transaction is presumed to be without sufficient consideration and the attempt to acquire the beneficial title free of the trust is unavailing.

Buffum v. Peter Barceloux Co., 289 U. S. 227, 77 L. Ed. 1140;

Elliott v. Landis Mach. Co. (Mo. 1911), 139 S. W. 356.

The Supreme Court of Washington in *Ennis v. New World Life Insurance Co.* (1917), 97 Wash. 122, 165 Pac. 1091, 1095, said:

". . . It is settled law that the promoters of a corporation stand in a fiduciary relation to the cor-

poration, and are bound by the principles governing persons acting in a fiduciary capacity. It has been held that the gratuitous issue of corporate stock by promoters to themselves is a fraud on existing stockholders."

Also, in the same Washington case, 97 Wash., at page 135, 165 Pac., at page 1095, the following from *Thompson on Corporations* (3d ed.), Sec. 104, is quoted with approval:

> "From this fiduciary relation it follows that the promoters must deal with the persons who come into the organization as members or stockholders in the utmost good faith . . . If the promoters obtain secret profits out of any transactions, and either they themselves become members of the board of directors, or persons under their control are elected as such directors, and the board thus composed adopts and ratifies the voidable transaction—this, it has been held, will create no impediment to proceedings by stockholders for redress."

See also:

Pepper v. Litton, 308 U. S. 295, 84 L. Ed. 281.

It follows that Log Cabin received and now holds nothing more than paper to the mine claims of Mutual Gold. Ferbert, Stiegler, Grill and Garbutt were all trustees and in turn Log Cabin likewise holds Mutual Gold's property for it as trustee.

Common Directors.

The Transactions Are Void Because There Were Common Directors on the Boards of Directors of Mutual Gold and Log Cabin.

Subsequent to the organization of Log Cabin on October 18, 1938, there were common directors for that company and for Mutual Gold. It is to be remembered that the majority of the five men on the board of directors of Log Cabin were at all times selected by Garbutt [Finding XX, Tr. 193]. On November 2, 1938, Collins, Grill and Ferbert were elected to fill the places of certain resigned members of Log Cabin. These men were on the board of Mutual Gold [Plaintiff's Exhibit 60, Tr. 351] which consisted of seven members. Grill was the attorney for Mutual Gold and assistant secretary of Log Cabin. This lineup continued into the meeting of January 4, 1939 of Log Cabin and thus covered the period of the execution of the November 1, and December 17, 1938 contracts. See the following references:

Mutual Gold directors' meetings of November 7, 28, December 9 and 17, 1938 [Tr. 322-324, 325, 326-327, 327-329;

Log Cabin directors' meeting of January 4, 1939 [Tr. 329-332].

All presumptions are against the good faith of transactions between corporations having common directors, as did Mutual Gold and Log Cabin. Such transactions are regarded as jealously by the law as are personal dealings

between a director and his corporation. The rule also applies to dealings between corporations, one of which was promoted and organized by the officers of the other. Bearing in mind that Ferbert, Collins and Grill, directors of Mutual Gold, were likewise directors almost from the beginning of Log Cabin, the following from *Geddes v. Anaconda Copper Mining Co.*, 254 U. S. 590, 65 L. Ed. 425, at page 432, is squarely in point:

> "The relation of directors to corporations is of such a fiduciary nature that transactions between boards having common members are regarded as jealously by the law as are personal dealings between a director and his corporation; and where the fairness of such transactions is challenged, the burden is upon those who would maintain them to show their entire fairness; and where a sale is involved, the full adequacy of the consideration. *Especially is this true where a common director is dominating* in influence or in character."

Also:

McCandless v. Furland, 296 U. S. 140, 80 L. Ed. 121;

Alexander v. Hillman, 296 U. S. 222, 80 L. Ed. 192;

Garrett v. Reid-Cashion Land & Cattle Co., 270 Pac. 1044.

Before concluding the argument, we direct the Court's attention to the first paragraph of the opinion of the District Court, stating that the case at bar is in one sense

a re-enactment of *Vance v. Mutual Gold Corporation* (Wash. 1940), 108 Pac. (2d) 799. In order that there may be no misunderstanding as to the effect of said Washington case this Court will note that it dealt with claims upon the indebtedness of Mutual Gold and is in no sense *res adjudicata* or binding here. The judgment dismissing the action *without prejudice* [Tr. 657] was affirmed by the Supreme Court. (108 Pac. (2d) 801.)

Conclusion.

The transactions complained of were void for *ultra vires* involved in not securing unanimous stockholder approval, or cash, as required by the common law in effect when Mutual Gold was organized. The law adopted after the organization of Mutual Gold by its terms did not authorize the transactions because such would be an unconstitutional interference with vested rights, and in any event did not apply because Mutual Gold did not amend its articles to render it applicable, as the act itself required. Mutual Gold could not subscribe for stock or transfer substantially all its assets without adequate consideration or render itself a shell and abrogate its corporate functions. Its acts were illegal because of lack of proper notice to the stockholders. Furthermore the transactions were induced by business compulsion and are therefore void or voidable. They are also illegal because of trustee and common director relationships.

Appellants submit that paragraph one of the judgment below be reversed and the cause remanded with direction

for further proceedings consistent with said reversal and the prayer of the complaint [Tr. 20-21] including cancellation of the agreements, deeds, bills of sale and assignments of the purchase contract whereby Mutual Gold purported to divest itself of its assets, and including an accounting with respect to all ores and the proceeds mined or extracted by Garbutt or Log Cabin. Much of the trial court's time was taken up by evidence more properly presentable later at an accounting. Upon reversal as prayed an accounting and restitution may be had in the light of applicable principles.

Respectfully submitted,

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No. 10,078.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

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Appellees.

BRIEF OF APPELLEES FRANK A. GARBUTT, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, AND MUTUAL GOLD CORPORATION.

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BRIEF OF APPELLEES FRANK A. GARBUTT, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, AND MUTUAL GOLD CORPORATION.

Jurisdiction.

It is conceded that the statement in appellants' opening brief disclosing jurisdiction of the District Court and of this Court is a correct statement.

Statement of the Case.

Mutual Gold Corporation, hereinafter called "Mutual Gold," was organized under the laws of the State of Washington on May 11, 1932, by Russell F. Collins, hereinafter called "Collins," and Ben L. Collins, brothers, and Harley Little.

On July 13, 1932, the Collins brothers entered into a contract [Tr. 23], hereinafter called the "1932 contract," with Alice Clark Ryan, her mother Mary N. Clark, and Chandis Securities Company, a California corporation, under which the Collins brothers were given the right to enter upon and develop some eighteen lode gold mining claims in Mono County, California, and to purchase the claims for $150,000.00 payable in installments. This contract was drafted by Frank A. Garbutt, appellee, hereinafter called "Garbutt," as agent for Mrs. Ryan, Mrs. Clark, and the corporation [Tr. 532]. Prior to 1932, considerable work in developing some of said claims had been done [Tr. 531, 543].

On July 18, 1932, the Collins brothers assigned the 1932 contract to Mutual Gold with the consent of Mrs. Ryan, Mrs. Clark, and Chandis Securities Company; and Mutual Gold assumed the obligations of the Collins brothers under that contract. Mutual Gold proceeded to spend a considerable sum of money in developing the property.

On April 28, 1934, Mrs. Ryan, Mrs. Clark, Chandis Securities Company, the Collins brothers, and Mutual Gold Corporation entered into a written agreement [Tr. 38] supplementing the 1932 contract in some particulars not material to this case. This was prepared by Garbutt [Tr. 748].

In 1935, Mrs. Clark conveyed her interest in the claims to Mrs. Ryan. Mrs. Ryan and Chandis Securities Company have ever since each owned an undivided one-half interest in said claims, and they are hereinafter called the "owners."

About that time Mutual Gold purchased and installed a second-hand stamp mill [Tr. 515].

On August 29, 1936, needing additional money, it entered into an agreement [Tr. 42] with one of its directors, J. A. Vance of Seattle, under which Vance, who had agreed to assist in raising the sum of $30,000.00, was made general manager with authority to expend said sum and with the right to remain general manager until it had been repaid to those who furnished it.

He went to the property October 3, 1936, and then went on to Los Angeles, where on October 10, 1936, he entered into an agreement on behalf of Mutual Gold [Tr. 45] with the owners represented by Garbutt [Tr. 748]. This agreement modified and amended the 1932 contract so as to permit milling of ore not theretofore allowed, so as to allow Mutual Gold a milling cost of $8.00 instead of $5.00 a ton as to certain ore, and so as to change Mutual Gold's option to buy into a firm obligation to pay the purchase price in installments.

He continued to act as manager in charge of the property until he closed down the mine on April 22, 1938 [Tr. 405, 780], by which time the $30,000.00 had been expended and Mutual Gold was practically without funds to continue operations, to pay its obligations, or to make further payments on the 1932 contract [Tr. 406, 605, 709, 785]. The mill had proved to be inefficient [Tr. 357, 406], and approximately $100,000.00 was needed to buy

a new mill and equipment. An unsuccessful attempt was made to interest one or two big mining companies in the property [Tr. 231, 460]. The whole enterprise appeared to have bogged down [Tr. 406].

In June, 1938, Vance had Robert J. Cole, a mining engineer, make a survey of the properties for Mutual Gold. Cole's report, dated June 14, 1938 [Tr. 242], was made available to the corporation at a meeting of the directors on June 25, 1938 [Tr. 459]. It indicated that the property had considerable value. Garbutt saw the report some time later, but did not believe it to be reliable [Tr. 310, 767, 768]. However, Vance evidently did rely upon it, for at said meeting of June 25, 1938, he proposed that he would form a new corporation to operate the property and put it into production if Mutual Gold would turn over to the new corporation a 60% interest in the property and give it 60% of the profits. This proposal was declined [Tr. 459, 713].

As a matter of fact, five of the seven directors preferred not to deal with Vance if they could obtain satisfactory financing elsewhere, as his operation of the property had not been very succesful, and as he was a lumber man rather than a mining man [Tr. 409, 410, 461, 771]. Some of the directors doubted Vance's interest in stockholders other than himself [Tr. 413, 414, 415, 417], and there was some fear that he would sue on some claims he had against the corporation [Tr. 466, 467]. He was at that time a large stockholder, the largest creditor, a director, and a vice-president of Mutual Gold [Tr. 185], and he still claimed to be its general manager.

Thereafter, on July 18, 1938, Lloyd Vance, son of J. A. Vance, for himself and his father, submitted a written

proposal [Tr. 232, 784] to the board of directors under which Mutual Gold was to retain a 40% interest in the assets and receive 40% of the profits if the new operating corporation to be formed paid Mutual Gold's indebtedness, or a 50% interest in the assets and 50% of the profits if Mutual Gold arranged to pay its own indebtedness. As there was then no other known source of financing for the enterprise [Tr. 460], a resolution was adopted by the directors [Tr. 236] that the offer be approved and recommended to the stockholders for acceptance after certain changes therein, agreed to by Vance, had been made, including a guaranty by Vance that $70,000.00 of the new corporation's stock would be subscribed for. The resolution also required that the annual meeting of the stockholders be called and held as soon as possible, and not later than August 6, 1938, for the purpose of electing a board of directors and for the purpose of approving and acting upon the Vance offer.

However, Collins told Director William L. Grill and probably the other directors at this meeting of July 18 that he was going to California to see if he could arrange for financing [Tr. 460]. Therefore, the resolution was made broad enough to include any other proposition that might be obtained in that the purpose of the stockholders' meeting was set out in said resolution to be the authorizing and empowering of the directors [Tr. 237] "to sell or otherwise dispose of the whole or any part of the assets of the corporation at such time or times and on such terms and conditions as they may deem adequate, and to form and enter into any working agreement along the lines as contemplated by the offer of said Lloyd Vance, or such other or different agreement as they may, in their absolute discretion, deem advisable * * *."

Pursuant to this resolution, a meeting of the stockholders was called for August 6, 1938, by notice [Tr. 239] sent to the stockholders. With each notice went a form of proxy [Tr. 188] and a letter written by J. E. Stiegler, president of Mutual Gold [Tr. 241].

Between the directors' meeting on July 18, 1938, and the stockholders' meeting on August 6, 1938, Collins, with M. J. Keily, went to Los Angeles [Tr. 407, 411, 528] to find out whether Garbutt, a competent mining man of means and much experience [Tr. 343, 563, 709, 745], would finance and operate the enterprise. Keily had been employed by Vance to act, and had acted, as mining engineer in charge of the property [Tr. 489] until it was closed down; and prior to that [Tr. 753] he had been employed by Garbutt for quite a long time [Tr. 340, 529]. However, Garbutt declined to enter a mining venture at his age, although he did enable them to contact two of his friends, namely, Hal Roach and Cecil De Mille, who he thought might be interested [Tr. 408, 529, 751].

At the meeting of August 6, 1938, Vance withdrew his offer [Tr. 250, 255] and submitted another, in which he proposed that a new corporation to be formed by him would take over the ownership of half of Mutual Gold's assets and take possession of all of them, and in which he expressly provided that his only obligation was to organize the new corporation [Tr. 256]. In fact, Vance was expecting Stiegler, president of the company, to provide part of the money [Tr. 417] to finance the new company. Under this offer, there was no assurance that a single share of the new corporation's stock would ever be subscribed for or paid for, or that the new corporation would ever have a dollar of working capital through sale of stock, loans, or otherwise. The new corpora-

tion was to agree to do certain things, but there was no assurance by Vance or anyone else that it could or would perform. This naturally did not increase the desire of the board to deal with Vance.

At this meeting, Collins said he thought there was a possibility of dealing with Garbutt [Tr. 251, 460]. With that in mind, the stockholders, including J. A. Vance [Tr. 501, 502], by more than a two-thirds majority [Tr. 247, 254], adopted a resolution authorizing the directors to do with the corporation's property as they saw fit, in order that the corporation might be able to accept any offer, whether from Vance or not [Tr. 461].

Later on the same day, the board of directors met and adopted a resolution authorizing Collins and Director G. H. Ferbert to go to Los Angeles at their own expense for the purpose of securing a contract with Garbutt if possible [Tr. 275]. Vance opposed the resolution, and when it was adopted, he withdrew his latest offer [Tr. 277]. The meeting was adjourned to August 13, 1938.

Collins and Ferbert made the trip [Tr. 385, 408, 710], but Garbutt still did not want to make a contract. A tentative draft of an agreement with De Mille was prepared, however, which was presented to the directors and discussed at the meeting on the adjourned date of August 13, 1938 [Tr. 381, 382]; and at that time Vance made another offer [Tr. 382, 667], which also contained the provision that his liability extended only to forming a new corporation. However, it appeared that a majority of the board did not want to enter into a contract of any kind with Vance [Tr. 382, 383]. De Mille soon learned of the possibility of trouble [Tr. 530] with Vance and declined to proceed further.

Directors Collins, Ferbert, Stiegler and Grill went to Los Angeles the week following [Tr. 418, 530, 714] and jointly importuned Garbutt to operate the property [Tr. 536]. They believed him to be the best man for the job [Tr. 408, 409, 414, 417, 418 to 422, 453, 454, 458, 461, 709 and 755]. At first he said he would not, but he promised to make arrangements to pay the $10,000.00 due the owners on November 1, 1938 [Tr. 419, 750]. Finally he reluctantly agreed to operate the property and to advance the necessary money on certain conditions. While the negotiations were in progress, he offered and arranged to get $25,000.00 to pay Vance and others what Mutual Gold owed them on open account, but as Vance refused to accept the money, the loan was not obtained [Tr. 466, 469, 715].

In the discussions, Garbutt learned of some particulars in which the Mutual Gold was in default under the 1932 contract; and on August 25, 1938, as agent of the owners, he directed to Mutual Gold a letter [Tr. 278] declaring a forfeiture of the 1932 contract, but leaving the way open to a revival thereof [Tr. 533]. On August 29, 1938, Vance wrote, as manager of Mutual Gold [Tr. 315], declining to accept cancellation of the contract, asserting that there was no default, and asking particulars as to the default. Garbutt answered, giving certain particulars, on September 2, 1938 [Tr. 279].

On September 2, 1938, the final draft of the agreement with Garbutt was executed [Tr. 51] by him and Mutual Gold.

At a meeting of the directors on September 7, 1938, which had been adjourned from time to time from August 6, 1938, six of the seven directors being present, all the

directors present except Vance and R. P. Woodworth voted for and passed a resolution ratifying the action of the officers in executing the contract of September 2, 1938, subject to ratification of the board's action by the stockholders at a special meeting to be called for that purpose. The absent director was Collins, who was in favor of the contract and approved it [Tr. 294]. Vance and Woodworth again attempted to have the Vance proposal accepted [Tr. 284 to 288]. They voted against a resolution authorizing the president to borrow $25,000.00 to pay open account creditors, of which Vance was the largest. Also, at this meeting, the directors instructed the secretary to call a meeting of the stockholders at the earliest possible time for the purpose of ratifying or refusing to ratify the execution of the contract of September 2, 1938, and for the purpose of considering and acting upon the Vance offer or any other offer.

On September 9, 1938, Garbutt wrote Mutual Gold, attention of Vance and Stiegler, a further answer to the Vance letter of August 29, 1938, in which he stated that negotiations for reinstatement of the 1932 contract would not be commenced until a satisfactory written reason had been given for Mutual Gold's failure to perform under that contract in a number of particulars [Tr. 289].

On September 12, 1938, the secretary sent out a notice of a stockholders' meeting to be held September 24, 1938, for the purpose of ratifying or refusing to ratify the action of the board of directors in accepting the contract of September 2, 1938, with Garbutt [Tr. 295], and for the purpose of considering the Vance or any other offer. With it went a form of proxy [Tr. 296] and a letter from President Stiegler [Tr. 292]. At the same time, Vance

sent to the stockholders letters advising against the Garbutt contract and enclosing a proxy for his use [Tr. 486, 488, 508].

On September 16, 1938, the president called a special meeting of the directors for September 19, 1938, to reconsider their action in accepting the Garbutt contract, and to consider any other proposal that might be presented [Tr. 297]. All the directors were present at the meeting, and all of them except Vance and Woodworth voted again to accept the contract and to ratify the action of the officers in executing it [Tr. 300]. The directors were advised that there was no point to going to the expense of holding another stockholders' meeting, as the stockholders had already given them full authority to act [Tr. 452, 709]. Therefore, by motion carried, they directed the secretary to call off the stockholders' meeting [Tr. 305]. At this meeting Vance and Woodworth again voted against a resolution authorizing the borrowing of $25,000.00 to pay the open account creditors [Tr. 304]. They also resigned as officers and directors.

Following this meeting, the contract of September 2, 1938, was re-executed on September 21, 1938, to satisfy the point made by some persons that the contract should not have been executed until after authorization by the board. This contract is hereinafter called "the September contract."

Pursuant to the provisions of the September contract, and at the time it was re-executed, Mutual Gold transferred its assets to Garbutt to be in turn transferred by him to a corporation which said contract required him to organize [Tr. 58, 60, 62, 760]. Some of the directors of Mutual Gold insisted that it should have at least full

minority representation on the board of whatever corporation was organized by Garbutt to operate the properties [Tr. 463], in order that Mutual Gold's interest might be protected. Garbutt, who had already by that time advanced some money to build a power line which was essential to efficient operation and which had to be built quickly to get ahead of the early snows that fall in that region [Tr. 243], proceeded to advance money as needed and to move as rapidly as he could toward putting the mine into operation [Tr. 194, 309].

On September 27, 1938, J. A. Vance, his attorney Mr. Abel, and Grill met in Garbutt's office in Los Angeles [Tr. 370, 671], but the conference did not reconcile the viewpoints of Vance and those who favored dealing with Garbutt. It ended with threats of litigation by the Vance interests [Tr. 462, 537].

On October 3, 1938, Garbutt's right to represent the owners was revoked [Tr. 317, 604].

On October 15, 1938, the owners, being assured that the defaults under the 1932 contract were in process of being cured, withdrew the notice of forfeiture [Tr. 537].

Garbutt caused the organization of Log Cabin Mines Company, hereinafter called "Log Cabin," to be started, and it was completed on October 18, 1938.

On or about that date he withdrew from the September contract for various reasons [Tr. 454, 533], including advice from his tax attorney that the contract might cause him some income tax difficulty. On October 21, 1938, the directors of Mutual Gold authorized Directors Grill and Ferbert [Tr. 320, 321] to enter into negotiations with Garbutt for a new contract. They went to Los Angeles for that purpose and conferred with him on October 31

and November 1 and 2, 1938 [Tr. 322]. At that time he handed them his formal withdrawal from said contract, and they, on behalf of Mutual Gold, entered into a temporary agreement dated November 1, 1938 [Tr. 66], to run pending the execution of another contract either with him or with someone else.

On November 2, 1938, two of the five organizing directors of Log Cabin resigned, and three of Mutual Gold's directors replaced them, thus giving Mutual Gold control of Log Cabin [Tr. 350]. Since then, Mutual Gold has at all times been represented by either two or three directors on Log Cabin's board, except for a while when Mutual Gold's representation resigned because of a fear that service on them in Washington might be deemed service on Log Cabin in a Washington suit which Vance had caused to be brought against it and others [Tr. 482, 483]. Also, Collins was employed at the mine where he could see what was going on and inform Mutual Gold [Tr. 309, 368, 535].

On November 7, 1938, Mutual Gold's directors approved and ratified the act of Grill and Ferbert in executing the temporary contract of November 1, 1938 [Tr. 322].

On November 28, 1938, Mutual Gold's directors considered some drafts of a new contract presented by Garbutt, but authorized Grill to prepare a contract for the corporation as nearly along the lines of the September contract as possible [Tr. 325].

As of December 17, 1938, another contract, hereinafter called the "December contract," was entered into [Tr. 69, 367] by Garbutt, Mutual Gold and Log Cabin, the execution thereof having been authorized by the Mu-

tual Gold's directors on that date [Tr. 327]. It was drafted by Grill [Tr. 326, 537 *et seq.*]. In the meantime, Garbutt had advanced to Log Cabin about $17,000.00 [Tr. 73] for the improvement of the property and $10,000.00 to pay the owners; and at the special request of Mutual Gold [Tr. 326, 568] had advanced other sums for taxes, repairs, etc.

On January 2, 1938, Garbutt began milling ore [Tr. 557].

Shortly after the Garbutt December contract was chosen in preference to the Vance contract and prior to January 14, 1938, Vance demanded immediate payment of all production notes and open accounts owing to him by Mutual Gold [Tr. 344], although he had previously declined payment and although they were not due.

At the next annual meeting of Mutual Gold's stockholders held on February 1, 1939, pursuant to notice [Tr. 606], the December contract was ratified by resolution. Out of 2,313,456 shares present or represented by proxy [Tr. 607], 1,458,969⅓ votes were cast for, and 841,153⅔ were cast against ratification [Tr. 433 to 435], notwithstanding the earnest efforts of Vance and his associates to prevent ratification [Tr. 485 to 518].

On or about February 28, 1939, in the Superior Court of Spokane County, Washington, Vance brought one suit on the open accounts and another on the production notes that Mutual Gold owed him [Tr. 610].

On April 13, 1939, A. P. Bateham and E. T. Richter, in co-operation with Vance, filed a suit in said Washington court to quiet the title of Mutual Gold to the 1932 contract [Tr. 603]. This suit did not go to trial.

About April 17, 1939, all of Log Cabin's 10,000 shares of capital stock were subscribed for by and issued to Mutual Gold, pursuant to resolution of Mutual Gold's directors [Tr. 320]. As Mutual Gold had no money to pay the $10,000.00 par value of the stock, it borrowed the money from Garbutt, pursuant to a resolution of its directors [Tr. 197, 321, 569]. Mutual Gold caused 5,001 shares to be transferred to Garbutt shortly thereafter. All the stock was placed in escrow by order of the California Commissioner of Corporations. It is still in escrow and none of Mutual Gold's 4,999 shares has ever been transferred, pledged or encumbered [Tr. 198, 547].

At and about the same time, Garbutt transferred to Log Cabin the assets which he had received from Mutual Gold. and Mutual Gold also executed and delivered conveyances and transfers of said assets directly to Log Cabin as contemplated from the beginning of negotiations with both Garbutt and Vance, and as authorized by resolution of Mutual Gold's board [Tr. 198, 199, 320]. Certain of Mutual Gold's assets that had not been transferred to Garbutt were also transferred to Log Cabin with the exception of some tailings and the surface of the ground on which they lay [Tr. 199].

On May 5, 1939, Log Cabin filed its suit against Mutual Gold in the Superior Court of Los Angeles County, California, to quiet its title to the 1932 contract. The directors of Mutual Gold resolved not to contest it, as they had no defense [Tr. 464, 476, 477, 480, 481]. Lloyd Vance, who had been elected a director of Mutual Gold, was present and heard the resolution read [Tr. 658].

On June 6, 1939, Mutual Gold's directors approved the December contract by resolution [Tr. 197].

On June 13, 1939, Log Cabin obtained judgment in its quiet title suit [Tr. 571].

On December 20, 1939, Vance caused the instant suit to be brought [Tr. 177, 178, 701, 705, 728, 736, 786 *et seq.*].

On February 14, 1940, the Spokane County Superior Court made its findings and conclusions and rendered its judgment against Vance in his suit for money owing him, holding that the money was not due and holding on other points much as the trial court did in the instant case [Tr. 641 to 657]. This judgment was sustained by the Supreme Court of Washington (*Vance v. Mutual Gold Corporation,* 6 Wash. (2d) 466, 108 Pac. (2d) 799).

Garbutt has carried out his agreement to the letter [Tr. 455]. He has advanced more money than he agreed to advance [Tr. 527]. He has given much of his time without compensation [Tr. 199, 528, 549]. He has not received any return on his advances, either on principal or interest. [Tr. 525, 528]. He has installed valuable and up-to-date equipment [Tr. 200, 541, 684]. He has not taken any notes from Mutual Gold for his advances or any liens on the property or on Mutual Gold's stock in Log Cabin [Tr. 547, 554]. He has taken out and milled a large amount of ore, reducing the cost of operation greatly; but because of the low grade of ore mined, there has been little profit [Tr. 201, 544, 552, 688, 695, 698].

ARGUMENT.

In appellants' argument they advance five theories under which they contend that the judgment should be reversed. Appellees will consider them in order.

First Theory—That the Acts Complained of Were Void Because Beyond the Powers of Mutual Gold to Perform (p. 19 of Appellants' Brief).

In seeking to establish this theory, appellants argue under eight subheadings designated (a) to (h), inclusive. These will be considered in that order.

Subheading (a), page 19 of appellants' brief. It is conceded that the law of the State of Washington governs.

Subheading (b), page 19 of appellants' brief. It is also conceded that at the time Mutual Gold was organized in 1932 there was no statutory law in Washington governing the sale of all the assets of a corporation. But the law of Washington on that subject, as established by the Supreme Court of that state, has never prohibited transactions of the kind involved here

There was no sale of assets by Mutual Gold. There was an exchange, and the trial court so held [Tr. 203, Conclusion I]. That exchange was made by a corporation which was at the time, and for several months before had been, unable to meet its matured obligations. The court so found [Tr. 190, Finding XV, and Tr. 199, Finding XXXV], and the findings had ample support in the evidence [Tr. 605, 709, 785]. Mutual Gold could not carry on without outside aid. In the exchange made to obtain that aid, it received not only half the stock of Log Cabin less one share, but also the benefit of the use of $10,000.00

loaned it to buy that stock, of $23,500.00 paid to the owners, and of $100,456.20 expended in equipping and developing the mining property, not to mention Garbutt's services without charge [Tr. 199, 200, 527, 528, 541, 549, 684].

In *Logie v. Mother Lode Copper Mine Company of Alaska,* 105 Wash. 208, 179 Pac. 833 (1919), the Supreme Court of Washington approved a transaction substantially like the one here involved.

Subheading (c), page 24 of appellants' brief. Appellants assert that Mutual Gold, which was organized in 1932, is not controlled by the Washington Uniform Business Corporation Act of 1933; and in support of that assertion, they argue three points, as follows:

Their first point (p. 24 of appellants' brief) is that to hold the act controlling would be to change or burden unconstitutionally the minority stockholders' rights relating to sales of assets. This point is based on the proposition that every stockholder had the right to require a cash consideration. As we have already shown, that proposition has no foundation, and, therefore, the point itself has no support.

Their second point (p. 31 of appellants' brief) is that the act cannot control because Mutual Gold did not amend its articles to include the provisions of the act. This point is raised for the first time on appeal. Assuming it to be true that Mutual Gold's articles were not amended, the conclusion does not follow, and appellants cite no decision to support it. Section 3803-61, Rem. Rev. Stat., reads:

> "Except where otherwise expressly stated herein, this act shall be applicable to any existing corporation

formed under general incorporation laws of this state for a purpose or purposes for which a corporation might be formed under this act."

Section 3803-37, relied upon by appellants, does not expressly state that the act shall not apply to existing corporations unless they amend their articles to make it apply. It is obviously intended to provide a simple method by which an existing corporation may eliminate a permissible difference between a provision in its articles and a provision in the act. For example, suppose the articles of an existing corporation provided that the presence in person or by proxy of the holders of two-thirds of the voting power of all shareholders should constitute a quorum. Section 3803-30 provides that a majority shall constitute a quorum unless otherwise provided in the articles. Therefore, the mere enactment of the act would not change the provision from two-thirds to a majority, but under section 3803-37, a simple method of making the change is provided if the change is desired.

If appellants' point were well taken, a corporation could, by declining to amend its articles, prevent its shareholders from having liability under section 3803-20-2, could prevent its directors and shareholders from having liability under section 3803-25, could prevent trustees from having any laibility under section 3823, and could prevent liability of its officers under sections 2639, 2641, 2642, 3828 and 3829.

Their third point (p. 34 of appellants' brief) is that the act cannot be made to control by including therein the remedy to minority stockholders given in section 3803-41. No decisions are cited in support of this point. It, like the first point, is based on the proposition that every stock-

holder had the right to require a cash consideration, and, therefore, it is without support for the same reason the first point is.

Under subheading (c) the appellants also contend (p. 35 of their brief) that the consideration was wholly inadequate, contrary to the trial court's conclusion VI [Tr. 204]. As already stated, Mutual Gold made an exchange in which it received not only half the stock of Log Cabin less one share, but also Garbutt's services and the benefit of the use of $133,956.20 advanced by him. Whereas before the exchange Mutual Gold had no money to carry on or to pay the owners, and had no adequate milling machinery, now it has a half interest less one share in a corporation that has a new and efficient mill and other equipment, and that has kept the 1932 contract in good standing [Finding XXXVIII, Tr. 200, and XLII, Tr. 202].

Appellants present the argument that because Garbutt might have quit after advancing $10,000.00 only, and because if he had done that Mutual Gold might have suffered some damage, the benefits actually received by Mutual Gold out of the transaction should not be considered. The argument is novel and no citations are given to support it. Appellees don't think it necessary to cite any against it.

Subheading (d), page 42 of appellants' brief. The act did not work any fundamental change in Mutual Gold's charter, or divert it from its original purpose. The articles themselves provide [Tr. 209, 210] that some of the objects and purposes for which the corporation is organized are:

> "To acquire by purchase or exchange, or in any other manner, in the United States or in Foreign

Countries, mining and mineral rights, concessions or grants, or any interest therein, and to sell, exchange, lease or in any other manner to dispose of the whole or any part thereof or any interest therein when desirable.

"To buy, sell, and otherwise deal in ores, metals, plants, machinery, tools, implements, groceries, provisions, clothing, boots and shoes, hardware, wooden and metallic ware, and all other articles and things in anywise required or capable of being used in connection with mining operations, and to manufacture all such articles when required."

Mutual Gold therefore had the right, by virtue of the articles themselves, to sell or exchange all its assets even before the corporation act was enacted, and without regard to any court decisions about corporations whose articles did not contain such provisions. (*Logie v. Mother Lode Copper Mining Co., supra.*)

Subheading (e), page 43 of appellants' brief. Appellants contend that no provision was made for the payment of creditors. But Garbutt arranged to get the money to pay the open-account creditors [Tr. 466, 469, 715], and Vance, the one creditor the directors feared, and the one who caused this suit to be brought and who sued the corporation in the Washington courts on accounts not due, refused to receive payment. Also, an agreement for payment of all creditors was made August 23, 1939 [Tr. 520]. The trial court's finding XXXVII [Tr. 200] is conclusive on the point, being supported by substantial evidence.

Subheading (f), page 45 of appellants' brief. No contract of any stockholder was impaired. There was no

contract that the corporation should not sell or exchange its assets for other than cash, or that it would not sell without unanimous stockholders' consent. Such contract as existed was exactly to the contrary under the above-quoted sections of the articles of incorporation. Article XII of the Constitution of Washington, section 1, reads:

> "Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the Legislature at any time, and all corporations doing business in this state may, as to such business, be regulated, limited or restrained by law."

Appellants contend that under *Moore v. Los Lugos Gold Mines,* 172 Wash. 570, 21 Pac. (2d) 253, decided in April, 1933, before the corporation act became effective, there was an implied contract with every stockholder as to corporations existing on January 1, 1934, that not all the corporation's assets could be transferred without his consent if the corporation was solvent, or for other than cash if not solvent. If the argument were sound, there could be no cumulative voting and no voluntary dissolving of such corporations in Washington.

Anyway, that case dealt with an attempt to change non-assessable shares to assessable shares. Of course the provision in the certificates that the shares were non-assessable was a part of the shareholder's contract, and of course it could not be changed without his consent. But at that, the court in its decision, when referring to the *Logie* case, said:

> "In the light most favorable to the respondents, the case holds no more than that where a corporation is unable to obtain funds with which to operate, the

board of trustees, with the approval of a large majority of the stockholders, may sell the entire property and business of the corporation even against the protest of the minority."

Section 3803-36, quoted on page 32 of appellants' brief, was intended to meet exactly the Mutual Gold situation and was strictly complied with [Finding X, Tr. 184, XI, XII, XIII, XIV, XV, XVII, XVIII and XXIX].

Subheading (g), page 46 of appellants' brief. Mutual Gold exists as it did, and has the same powers that it had, before the acts complained of by appellants were performed. It has merely exchanged one kind of property for another. That doesn't make a shell of either corporation involved in the exchange. Mutual Gold doesn't have the power now to operate the mine, it is true, but that doesn't make a shell of it.

Subheading (h), page 49 of appellants' brief. The sections of Mutual Gold's articles quoted above do not authorize giving away corporation property or disposing of it in violation of law; but this property, as the trial court held, was exchanged for an adequate consideration in accordance with the law [Tr. 203, 204]; and as above set forth, the evidence amply supports that holding.

The amount of stock issued by Log Cabin is not important. Of course $10,000.00 was not enough money to finance the enterprise, nor would the $70,000.00 that Vance once proposed to raise have been enough. But the money that was needed was furnished. Keeping the amount of stock low did keep organization expense down at a time when every dollar counted. If the mine is eventually successful, the shares will be worth much more than

par. In any event, the stock was divided between Garbutt and Mutual Gold exactly as agreed. And when appellants say that the assets of Log Cabin are merely those formerly belonging to Mutual Gold, they ignore all the new machinery and equipment bought by Log Cabin.

Appellants' Second Theory—That Proper Notice Was Not Given the Stockholders (p. 50 of Their Brief).

The notices given and the resolutions passed by the directors and the stockholders in connection therewith, are set out in Findings X [Tr. 184], XI, XII, XIII, XIV, XVIII (September 7, 1938, should be September 19, 1938, in this finding), XXVII and XXIX. At the time the resolution of August 6, 1938, was adopted, Mutual Gold was not able to meet its obligations then matured [Finding XV, Tr. 190], the amount of which is set out in Finding XXXV [Tr. 199].

It is immaterial that no mention was made in the notice of the stockholders' meeting of February 1, 1939, that the matter of ratification of the December contract would be considered. That was a regular annual meeting, and any ordinary corporation matter could be brought up for action. Section 3 of the by-laws [Tr. 218] requires that the notice of special meetings shall state the objects thereof and provides that no other business shall be transacted at such special meetings. But there is no such provision as to annual meetings, and section 7 of the by-laws [Tr. 220] contemplates that new business shall be taken care of at annual meetings and does not place any restrictions on such business.

The notice sent out for that meeting stated that it was to be "for the purpose of electing a board of directors for said corporation for the ensuing year, for hearing the reports of officers of said corporation and for the transacting of any other business that may properly come before said meeting" [Tr. 438].

It should be noted too that the meeting of the stockholders on August 6, 1938, was a regular annual meeting.

Appellants' Third Theory—That There Was Business Compulsion by Garbutt (p. 53 of Their Brief).

This theory is disposed of by Findings XXXIX and XL [Tr. 201, 202], which are supported by much uncontradicted evidence [Tr. 251, 275, 343, 382, 383, 385, 406, 407, 408, 409, 411, 414, 415, 416, 417 to 422, 453, 454, 458, 460, 461, 528, 530, 536, 563, 605, 709, 710, 714, 745, 755 and 785].

Appellants' Fourth Theory—That Garbutt Violated His Trust (p. 66 of Their Brief).

The evidence shows that everything that was done by Garbutt and those he dealt with was contemplated from the beginning of negotiations between him and Mutual Gold. His first proposal contemplated that he should receive everything he did receive. Any trust relationship arising was incidental to, and was a part of the procedure of, carrying out the original plan, which was not departed from in any material respect. In other words, before the trusteeship arose, both Garbutt and Mutual Gold intended to do everything that was done after it arose, except that Garbutt advanced more money than he expected to advance. He did not fail in any particular to do what he

agreed to do. No violation of a trust can arise out of transactions which a competent beneficiary enters into and wants the trustee to enter into.

The evidence shows that so far Garbutt has not profited at all anyway, but on the contrary is out considerable work, and has not recovered any of his advances. It shows also that whether he will ever get his advances back, much less a profit, is an uncertainty, which he is willing to pass on to plaintiffs for half said advances in cash and the rest over a reasonable time [Tr. 549]. Appellants appear to assume that he has acquired a very valuable mining property, but the value of a mining property is finally to be determined by the amount of ore that can be mined and milled profitably. Actual efficient operation has so far shown no substantial profit.

Further, Garbutt does not have the mining claims. They are still owned by Mrs. Ryan and Chandis Securities Company. All he has is half the stock, plus one share, of a corporation that has a contract to buy the property. If he pays for the property out of earnings or out of his own private funds loaned to Log Cabin, he will have then, as a Log Cabin stockholder, only an approximate half interest in this property which he will then have paid for; and Mutual Gold, as such stockholder, will have an approximate half interest in this property which it will not have paid for and could not have paid for. Mutual Gold has been furnished with working capital and the services of a capable executive; and for that it was and is willing to let Garbutt have a half interest in some equipment of little value that it had, in some unimproved unpatented claims of no proved value, and in the Ryan-Chandis Securities Company claims if and when he can pay for them.

Appellants' Fifth Theory—That the Transactions Are Void Because There Were Directors Who Served on Both the Mutual Gold and the Log Cabin Board (p. 68 of Their Brief).

Those of Mutual Gold's directors who have served on the Log Cabin board [Tr. 350] were placed there at the request of Mutual Gold in order that they might look out for Mutual Gold's interests [Tr. 463]. The fact that Mutual Gold's directors were for a while in the majority on the Log Cabin board, and the fact that Mutual Gold has had full minority representation on that board at all times when it wanted it, is testimony to the good faith and fair dealings of Garbutt, who holds a majority of the Log Cabin stock. The rule against directors serving on two boards does not go so far as to prevent representation intended to safeguard the interests of Mutual Gold.

Appellees submit that the judgment should be sustained.

Respectfully,

DAVID E. HINCKLE,
Attorney for Appellees.

No. 10,078.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HELEN M. SUTHERLAND, CHARLES W. SUTHERLAND, M. I. HIGGENS, MAYBELLE HIGGENS and HELEN MAUDE LORENZ,

Appellants,

vs.

FRANK A. GARBUTT, CHANDIS SECURITIES COMPANY, a corporation, ALICE CLARK RYAN, LOG CABIN MINES COMPANY, a corporation, and MUTUAL GOLD CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEE, CHANDIS SECURITIES COMPANY.

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Appellees.

BRIEF OF APPELLEE, CHANDIS SECURITIES COMPANY.

Introductory Statement.

The appellee, Chandis Securities Company, was joined as a defendant in the action brought by appellants in the United States District Court, Southern District of California, Central Division, from whose decision this appeal is taken, by reason of the fact that it is a co-owner of

the mining claims situated in Mono county, California, the subject of the purchase and sale contract involved in the action [Tr. p. 23] and a party to the contract, and for the purpose of making the judgment of the court binding upon it, the only relief against the owners sought being that they "be required to recognize Mutual Gold Corporation as vendee, owning the purchase contract and to accept from these plaintiffs as stockholders of Mutual Gold Corporation on its behalf, the unpaid balance of said installment (the $10,000.00 installment of purchase price which fell due November 1, 1939)." [Complaint, Tr. p. 21.]

Although the complaint contains allegations to the effect that the various contracts, deeds, bills of sale and assignments of which appellants complain, were executed, and the various acts of Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company of which appellants complain, were done with the knowledge and approval of the owners pursuant to and as a part of an unlawful conspiracy to transfer all of the assets of Mutual Gold Corporation to Log Cabin Mines Company without consideration, etc. [Tr. pp. 13, 14 and 15], the conspiracy alleged is one to which Frank A. Garbutt and the board of directors of Mutual Gold Corporation and not the owners are alleged to be parties [Tr. p. 7], and there was produced no evidence to prove these allegations or to indicate even that the appellee, Chandis Securities Company, had actual knowledge of any of the acts complained of at the respective times when they were done.

The dispute out of which this litigation arose is between parties to the action other than the appellee, Chandis Securities Company, and all of the questions involved in the appeal suggested by appellants in their opening brief concern issues affecting that dispute. Inasmuch as those questions presumably will be covered in the brief to be presented by counsel for appellees, Frank A. Garbutt, Mutual Gold Corporation and Log Cabin Mines Company, parties directly concerned in the dispute, it is felt that no useful purpose can be served by attempting to cover those questions in this brief. However, the appeal does involve a question concerning the owners not mentioned in appellant's opening brief which should be considered in the determination upon the appeal. The brief of appellee, Chandis Securities Company, will be devoted to this question.

Question Concerning Owners Involved in Appeal.

In a derivative stockholder's suit seeking on behalf of the corporation a decree for equitable relief, including the setting aside of assignments of the purchaser's interest under a purchase and sale agreement, and requiring the sellers to recognize the corporation as the owner of the purchaser's interest and to accept payments upon the purchase price from the plaintiffs on behalf of the corporation, may the plaintiffs be required to do equity by paying or tendering or requiring the corporation to pay or tender payment of sums due the sellers under the purchase contract?

Statement of the Case.

Determination of the above question requires consideration of certain facts in addition to those set out in the statement of the case conained in appellant's opening brief. The contract for sale and purchase of the Log Cabin mining claims situated in Mono county, California [Tr. p. 23], as amended under modification agreement dated October 10, 1936 [Tr. p. 45] provided for payment to the sellers of a purchase price of $150,000.00. Under the modification agreement, minimum annual installments of $10,000.00 each fell due on November 1, 1937, November 1, 1938, November 1, 1939 and November 1, 1940, and the balance ($100,000.00) fell due November 1, 1941. At the time the action was brought, Mutual Gold Corporation had paid $20,000.00 on the purchase price (App. Op. Br. p. 7), Frank A. Garbutt paid the $10,000.00 installment which fell due November 1, 1938. [Tr. p. 38.] The $10,000.00 installments which fell due November 1, 1939 and November 1, 1940, respectively, were paid during the pendency of the action.

Appellants offer to pay to the owners the $10,000.00 minimum installment of purchase price which fell due November 1, 1939 [Tr. p. 16], but while making a general offer to do equity [Tr. p. 20] do not offer on behalf of themselves or Mutual Gold Corporation to pay the remainder of the purchase price.

Argument.

The judgment of the District Court denying appellants the relief sought should be affirmed, because appellants have not tendered or required Mutual Gold Corporation, for whose benefit the relief is sought, to tender payment to the owners of the entire purchase price in accordance with the terms of the purchase contract as amended. The action being a derivative stockholder's suit and one in which equitable relief against the owners is sought, the equities of Mutual Gold Corporation, as well as those of the individual appellants, must be taken into account. Appellants cannot seek equity for the benefit of the corporation without doing equity or requiring that the corporation do equity in reference to the rights of the owners against whom equitable relief is sought.

The following authorities are cited:

Garretson v. Pacific Crude Oil Co. et al., 146 Cal. 184;

Michaels v. Pacific Soft Water Laundry, 104 Cal. App. 349, 286 Pac. 165.

In the case of *Garretson v. Pacific Crude Oil Co., et al., supra,* the California Supreme Court affirmed judgment of the Superior Court for defendants in a derivative stockholder's suit brought to cancel certain shares of the corporation issued in exchange for leases assigned to the corporation, and held:

> "We do not think the plaintiff has made a case which would warrant the court in canceling the shares given in payment for the leases, and at the same time allow the corporation to retain the consideration, and

plaintiff does not offer to restore the leases. Plaintiff is seeking equity for the benefit of the corporation while wholly failing to do equity or requiring the corporation to do equity."

The case of *Michaels v. Pacific Soft Water Laundry, et al., supra,* involves a stockholder's derivative suit brought in the California Superior Court to cancel certificates for 22,100 shares of the stock of the defendant corporation sold by the corporation from its treasury for cash at par, on the ground that the stock was issued in violation of the terms of a permit issued by the California Corporation Commissioner. The trial court rendered judgment canceling the stock without requiring that the corporation restore to the purchaser the purchase price paid. In reversing the decision the California District Court of Appeal points out that the equities between the corporation and the purchaser of the stock must be considered, and that where treasury stock is sold to a bona fide purchaser in violation of conditions contained in the permit of the Corporation Commissioner, the stock cannot be canceled without requiring the corporation to restore to the purchaser the consideration paid.

It is respectfully submitted that appellants are not entitled to a decree requiring the owners to recognize Mutual Gold Corporation as the owner of the purchaser's interest in the purchase contract without requiring that the corporation on whose behalf suit is brought pay to the owners the remaining purchase price under the contract in accordance with its terms.

Respectfully submitted,

RICHARD G. ADAMS,

Attorney for Appellee, Chandis Securities Company.

No. 10,078.

IN THE

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Appellees.

APPELLANTS' REPLY BRIEF.

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Appellees.

APPELLANTS' REPLY BRIEF.

Comments on Appellees' Statement of the Case.

"Appellees" will be used herein to designate Garbutt, Alice Clark Ryan, Log Cabin and Mutual Gold. Chandis Securities Company has also filed a brief which will be hereinafter separately answered.

Appellees, outside of matters already covered in Appellants' Opening Brief, have included many immaterial facts which tend to emphasize, first, the controversy between Vance and Garbutt and, second, a comparison of the two regimes. Vance's management is detailed and contrasted

with Garbutt's, and appellees recount at length, with implications of complete approval, Garbutt's activities in committing the acts complained of. It is entirely immaterial to the question of *ultra vires,* adequacy of consideration, constitutional rights arising out of stockholder relationship, business compulsion, and the like, whether Vance was a lumberman or a musician, whether he was a good manager or a bad manager, or whether he bought a second-hand mill or a brand-new mill. It is equally beside the point whether Garbutt had been in the mining business all his life or only since September 2, 1938, whether the mill that he installed cost $100.00 or $100,000.00, and whether he doubled the money for himself and the minority stockholders of his creature corporation and thereby put some money in the pocket of the stockholders of Mutual Gold, or whether he contributed large sums of money besides plowing back into the mine the proceeds of the ore he took out and thereby merely broke even. Likewise, whether or not Vance caused the instant suit to be brought (upon which there was no finding) is immaterial. In the last paragraph of page 15 of appellees brief Garbutt's achievements are summed up to the effect that he has done more than even the optional portions of the agreements contemplated and has made nothing from his deal. Appellants see no other effect in this recital than a comment upon his judgment as a mining man in engaging in the transaction and carrying it on to the extent indicated in the face of *optional* provisions which permitted him to retire at any time. In any event, and as argued

in Appellants' Opening Brief, and treated further hereinafter, the measuring stick of constitutionality and other requirements must be applied at the time the original transaction was entered into and not subsequently.

Appellees' statement of the case seeks, also erroneously, to paint an unrelieved picture of the condition of Mutual Gold, no doubt for the purpose of heightening Garbutt's role as an alleged savior. On page 3 of the brief they state that Mutual Gold was practically without funds to pay its obligations, and on page 4 that the whole enterprise appeared to have bogged down. The reference to support these statements is principally Tr. 406. There it appears merely that "Its creditors were not pressing" and, although the company did not have funds to carry on, "the mine was not in pressing need of money to pay its bills, but it was in need of money if it was to build a new mill or to operate its old mill." As appellants emphasize, Mutual Gold had two sources of financing. Even if it had only one, the Constitution and the law cannot be flouted.

On page 8 of appellees' brief, with reference to Tr. 466, 469 and 715, the statement is made that Garbutt arranged to obtain $25,000.00 to pay Vance and others, but that Vance refused to accept the money. This is repeated on page 20. On page 9, and also on page 10, reference is made to two different resolutions of the board of directors of Mutual Gold authorizing the borrowing of $25,000.00. On page 9 it is stated that this was to pay open account creditors "of which Vance was the largest," and on page 10 that it was to pay the "open

account creditors." The respective references are to Tr. 287 and 304. It appeared that Vance voted against both of these resolutions. The transcript does not show the purpose to which the corporation was planning to put the money, or why Vance may have refused the benefit of the loan Garbutt was arranging, but the impression is erroneously left that Vance repeatedly refused to accept payment on his claim or to permit the other creditors to be paid. We submit that this matter is immaterial, but, in any event, the treatement thereof is prejudicially erroneous. The material refusal was Garbutt's. As stated at page 57 of Appellants' Opening Brief, while acting in the double role of owner's agent and personal negotiator, Garbutt stated that if the full balance on the purchase price of the mine were paid he would not take it.

On page 12 of appellees' brief the statement is made that three of Mutual Gold directors on November 2, 1938, were elected to Log Cabin's board, giving Mutual Gold control of Log Cabin and that, subsequently, Mutual Gold was represented by either two or three directors, except for one period. The argument is that Mutual Gold therefore was fully advised and consented to all acts complained of. On page 26 of the brief appellants say that this representation is testimony to Garbutt's good faith and fair dealing. These directors, however, were Collins, Grill and Ferbert, who at all times while on the board of Mutual Gold and elsewhere, voted in favor of and worked for the transactions complained of. They, in short, always stood with Garbutt and their action in helping to consum-

mate an illegal transaction cannot deprive Mutual Gold of its rights. This is a derivative action brought by minority stockholders because Mutual Gold is in control of these men in collaboration with Garbutt.

The reference to the Vance suits in Spokane County, Washington, on page 13, including *Vance v. Mutual Gold Corporation,* referred to on page 15 of appellees' brief, is erroneous in that the court did not hold "much as the trial court did in the instant case." As stated in Appellants' Opening Brief, at page 70, the holding of the court, sustained upon appeal, was that the action be dismissed without prejudice. This case is in no sense *res judicata,* even though some of the findings of the factual history necessarily may have been similar to findings below in the case at bar.

As stated on page 14 of appellee's brief, all the stock of Mutual Gold was placed in escrow by order of the California Commissioner of Corporations. Although this was a developed mine which had produced large amounts of ore and had other ore blocked out, the stock was probably considered by the Commissioner the same as promotion stock, or stock of speculative value. Due to the fact that it was optional with Garbutt whether he invested more than the $10,000.00 the stock of Log Cabin was unusually speculative.

See:

Ballantine & Sterling (1938 ed.), California Corporation Laws, p. 360.

ARGUMENT.

Reply to Appellees' Comment on the Question of Ultra Vires.

It is immaterial whether the transaction is called a sale or an exchange. On page 16 the attempt is made to distinguish these terms. They, however, are essentially alike, as appears from the following authorities.

The distinction between a sale and an exchange of property is rather one of shadow than of substance. It can make no essential difference that goods and merchandise are transferred and paid for by other goods and merchandise instead of by money, which is but the representative of value or property.

Com. v. Clark, 14 Gray (Mass.) 372.

An exchange of property is a mutual transfer of one or more pieces of property for property other than money.

See:

23 *Corpus Juris (Exchange of Property),* Sec. 1, p. 184.

There is no substantial difference between sale and exchange.

See:

23 *Corpus Juris (supra),* Sec. 1, p. 186, and note 29, cases cited;

Gilbert v. Sleeper, 71 Cal. 290, 292, 12 Pac. 172, 173.

An exchange is two sales.

Robbins v. Pacific Eastern Corp., 8 Cal. (2d) 241, 269, 65 Pac. (2d) 42, 56.

In an exchange neither or both things received are money only.

> *U. S. v. Pan-American Pet. Co.* (1925, D. C. S. D. Cal.), 6 Fed. (2d) 43 at 83; aff. 273 U. S. 456, 71 L. Ed. 734.

However, whether it be a sale or an exchange, in view of the optional nature of the contracts, it is immaterial so far as the legality of the contracts are concerned that Garbutt paid $23,500.00 to the owners and something more than $100,000.00 in equipping and developing the property. Had he put in nothing beyond the $10,000.00, or had he put in a million dollars, the legal result would be the same.

Logie v. Mother Lode Copper Mines, 106 Wash. 208, 179 Pac. 835, upon which appellees rely to sustain the judgment, and which they state approved a transaction substantially like the one in the case at bar, is clearly no authority whatsoever for appellees, as we have pointed out in our Opening Brief, at pages 38 to 41. This case has been overruled, or, if not overruled, so emasculated that it is inapplicable to the case at bar. In fact the Supreme Court of Washington in the *Moore* case (Appellants' Opening Brief, pp. 38, 39) expressly pointed out the fact that the court in the *Logie* case did not consider the question of the adequacy of the consideration or any constitutional question, which matters are involved in the case at bar. The difference between inadequacy of the consideration in the case at bar and the adequacy of the consideration in the *Logie* case is set forth at pages 39 to 41 of our Opening Brief. Consequently, there is no such basis for the sustaining of the trial court's judgment. Appellees appear to concede, on

page 17 of their brief, that the unconstitutional nature of the transaction would follow hand-in-hand with the inadequacy of the consideration.

In the middle of page 17 of appellees' brief is a casual treatment of appellants' argument at pages 24-31 of appellants' brief. The failure to meet the contention that Washington follows the minority view, to the effect that a new law cannot change or burden intra-corporate relationship, including minority stockholder rights relating to sale of assets, and their failure to cite any authority to the contrary leaves this fundamental argument made by appellants determinative of the whole case.

In commenting on appellants' subhead (c), page 24 of appellants' brief, appellees take the position that Section 3803-61, *Rem. Rev. Stat.,* did not require Mutual Gold to amend its articles so as to include the provisions of the Act of 1933. The first few words of the section negative this argument completely by saying "except where otherwise *expressly* stated herein." (Emphasis ours.) Section 3803-37, *Rem. Rev. Stat.*, as pointed out in Appellants' Opening Brief, at page 32, states that a corporation may amend its articles so as to "*include* any provision authorized by this act." (Emphasis ours.) An inclusion is not the elimination of a difference under the examples given by the appellees on page 18 of their brief, such as conflict in the matter of a quorum. "Include" does not mean the same as "conform." In order for this new provision of the Act to become a part of the articles of incorporation it must be included by an amendment.

Even if appellees' argument is sound, nevertheless it would be necessary for the stockholders of the corporation to adopt an amendment. The common law as it existed in the State of Washington at the time the corporation

was organized is a part of said articles of incorporation, as it is of all contracts. The common law required unanimous consent of the stockholders to approve sale of all the assets and for a change to be made by a subsequent statute lowering the percentage of stockholders who must consent, an amendment to the articles must be adopted, the same as in the example given by appellees.

Appellees endeavor to state, on page 18 of appellees' brief, that our contention concerning the necessity of amending the articles is not well taken, for the reason that otherwise no liability under Sections 3803-20-2, 3803-25, 3823, and Sections 2639, 2641, 2642, 3828 and 3829 could arise. However, these latter sections lend no support to appellees' argument, because they have nothing to do with any existing contract. A director or officer has no vested right in paying dividends out of capital or in defrauding creditors, and no contract right of a director or officer has been impaired. As for liability of a shareholder for the unpaid amount of his stock subscription, that is merely a codification of the common law rule.

It is true, as appellees state on page 19, that the articles provide that the corporation may acquire by purchase mining rights and may sell, exchange, lease or in any other manner dispose of the same. *This, of course, means in a lawful and proper manner,* and one of the limitations upon the exercise of such a power is that such exercise cannot make a fundamental change in the charter so as to divert the corporation from its original objects and purposes. The diversion consists in the loss of title to all assets, plus loss of all control over such assets and the management thereof, for an entirely inadequate consideration. All the corporation had left of a positive nature was the contingency of receiving dividends.

In response to appellees' statement, on page 21, which attempts to meet subdivision (f) dealing with the impairment of obligation of contract and due process, it is sufficient to say that the matter of cumulative voting is purely a procedural one and, so far as voluntary dissolution of corporations or cumulative voting, for that matter, the problem is whether vested rights are involved and the desirability of such statutory provisions is immaterial. Appellee cites no authorities in support of his unsound argument.

Appellees' reply to subhead (g) on page 46 of appellants' brief (page 22 of appellees' brief) to the effect that the transaction in question left Mutual Gold with the same powers that it had previously, except that it doesn't have the power to operate the mine, is unsound. In the first place, Log Cabin, the new corporation, owns substantially all of the assets, and Mutual Gold, as a stockholder, has no ownership in the corporate property as such, but only the right to receive dividends, if any, and to receive any portion of the property on liquidation, if any such exist. Mutual Gold, by virtue of its being a minority stockholder, has nothing to say in connection with the management of the property, or the control of the corporation, which is vested in Garbutt, the majority stockholder. Mutual Gold, instead of being the operating company, is relegated to a passive position. A more perfect example of a corporate shell could hardly exist.

The sufficiency and adequacy of the consideration of a contract must be determined from the facts of the transaction as they existed when the contract was entered into, rather than by subsequent developments, whether good or bad. Equity will not estimate the fairness and adequacy

of the purchase price with relation to events occurring subsequently to the time when the parties contracted.

Long Beach Drug Co. v. United Drug Co. (1939), 13 Cal. (2d) 158 at 165, 88 Pac. (2d) 698 at 701;

Gosnell v. Lloyd (1932), 215 Cal. 244 at 254-5, 10 Pac. (2d) 45 at 49;

Parsons v. Cashman (1913), 23 Cal. App. 298 at 301, 137 Pac. 1109 at 1110;

Morrill v. Everson (1888), 77 Cal. 114 at 116, 19 Pac. 190.

See:

6 *California Jurisprudence (Contracts),* Sec. 116, p. 167, and Sec. 128, p. 190.

In the *Morrill* case, *supra,* an option similar to the one in the case at bar was involved, in connection with the purported consideration.

Illegality.

This is treated on pages 50-52 of Appellants' Opening Brief. Appellees' reply is on pages 23 and 24 of their brief. Appellees are in error in stating that it is immaterial that no mention was made in the notice of the stockholders' annual meeting that ratification of the December contract would be considered. The contention is that at such a meeting any ordinary corporation matter could be brought up for action. In the first place, ratification of the December contract was not an "ordinary" matter, because it involved the sale of substantially all of the assets of Mutual Gold and made that company merely a corporate shell. It is well known that stockholders usually

pay little attention to notices of meetings. If the stockholder is informed of a matter which will come up which will vitally affect his interests he can then arrange to be present in person or can name and instruct a proxy how to vote on the matter. The stockholder is lulled into a false sense of security where the notice fails to mention the vital matter to be considered.

As we said on page 51 of Appellants' Opening Brief, the Washington statute provides for the purpose of stockholders' meetings to be stated in the notice.

The notice of a general or annual meeting must specify the business to be considered which is extraordinary or unusual and not ordinarily brought up at a general meeting, such as the sale of substantially all of the corporation's property, the increase of its stock, amending its by-laws in an important particular, increasing the number of directors, and the like. (See Appellant's Opening Brief, pages 50-52.)

See:

18 *Corpus Juris Secundum (Corporations),* Sec. 544(3), p. 1230;

5 *Fletcher Cyc. Corp.* (Perm. ed.), Sec. 2009, pp. 47-49; Sec. 2016, p. 79;

Des Moines Life & Annuity Co. v. Midland Ins. Co. (1925, D. C. D. Minn.), 6 Fed. (2d) 228 at 229 (sale of all of corporation's property);

Starrett Corp. et al. v. 5th Ave. & 29th St. Corp. (1932, D. C. S. D., N. Y.), 1 Fed. Supp. 868 at 871 and 874 (sale of all of corporation's property);

Johnson v. Tribune Herald Co. (1923, Ga.), 116 S. E. 810 at 812;

Dolbear v. Wilkinson, 172 Cal. 366 at 369, 156 Pac. 488 at 490.

Further, appellees say that the notice stated the meeting was for the purpose of electing a board of directors and for the transacting of "any other business that may *properly* come before said meeting." (Emphasis ours.) Appellants contend that such matter as a ratification of the December contract could not "properly" come before a meeting unless specific notice were given of the same in the notice. The purpose of a notice is to inform stockholders what is to come before the meeting and to give them the opportunity to attend if an important matter is to be considered. Therefore the said notice is not a legal notice, because it is not sufficient to apprise the stockholders of the unusual, extraordinary or important matter which the meeting may attempt to consider. The "other business" provision in the Mutual Gold notice of the stockholders' annual meetings of February 1, 1939, and August 6, 1938, was therefore legally insufficient [Tr. 606, 239-240].

See:

5 *Fletcher Cyc. Corp.* (Perm. ed.), Sec. 2009, p. 50;

Dolbear v. Wilkinson, supra, 172 Cal. 366 at 370, 146 Pac. 488 at 490;

Bushway Ice Cream Co. v. Bean Co. (1933, Mass.), 187 N. E. 537 at 539;

Bagley v. Reno Oil Co. (1902, Penn.), 50 Atl. 760 at 762.

Business Compulsion.

This is treated by appellants on pages 53 to 65, inclusive, of the Opening Brief. Appellees reply with a few lines on page 24. Appellants do not concede that the matter is disposed of by Findings XXXIX and XL [Tr. 201, 202] for the following reasons: The transcript references of the appellees relate to various details of the inception of the September 2d contract, the attempt to get De Mille interested, the financial status of Mutual Gold, the expressed preference of the majority of the directors to deal with Garbutt rather than Vance, the statements of Garbutt that he was reluctant to enter the deal, Garbutt's qualifications as a mining man and the statement of certain of the Garbutt directors of Mutual Gold that what Garbutt said did nothing to coerce them and that they were not frightened by notices of forfeiture. We see nothing sufficient in this line of testimony to support the findings, even if they are applicable to business compulsion, nor does this evidence constitute any substantial conflict with the evidence referred to on pages 53 to 62 of Appellants' Opening Brief establishing business compulsion and to which the Court's attention is again respectfully directed.

Trusteeship.

Appellees' comment on appellants' trustee argument consists mainly of a repetition of the recital of what Garbutt did after he had consummated the illegal and unconstitutional transactions appellants complain of. Such is entirely immaterial and particularly is it immaterial that on the witness stand he offered to enter into negotiations designed to pay him back half his advances in cash and the rest over a reasonable time.

Reply to Brief of Appellee Chandis Securities Company.

The argument of this appellee consists of the single point that appellants cannot demand recognition of Mutual Gold as the purchaser of the mining claims under the allegations of the complaint inasmuch as the appellants make only a general offer to do equity and do not offer to pay the owners the balance of the purchase price. The allegations of the complaint are as follows:

> "Wherefore plaintiffs, as such stockholders of Mutual Gold Corporation, and in its behalf, hereby offer to pay the amount of said installment (November 1, 1939) to keep the purchase contract in good standing as the property of Mutual Gold Corporation, and, upon such payment, be subrogated to all the rights of the owners in respect to said installment." [Tr. 16.]

> ". . . plaintiffs further allege they are willing, and hereby offer to do equity in the premises as same may be adjudged, declared and determined by this court, and they are likewise willing, and hereby offer, to abide by and perform any and all requirements and conditions that may be imposed by the court as attendant on, and precedent to the granting of the relief prayed, or to which the court may conclude the plaintiffs and other stockholders and creditors are entitled." [Tr. 20.]

The Court will note that the complaint was filed December 20, 1939 [Tr. 98], almost two years before the final payment of $100,000.00 became due.

Inasmuch as this is a derivative suit, in any event, it would not be proper to visit upon stockholder plaintiffs as strict requirements of pleading as if Mutual Gold, the real party in interest, were the plaintiff.

Be this as it may, this is a court of equity. It can provide in its decree for the method by which Mutual Gold shall meet its obligations to appellee Chandis Securities Company and such other matters as the Court deems necessary to do equity among all the parties.

See:

10 *California Jurisprudence (Equity),* Secs. 50 and 51, pp. 508-11, 512;

Rosemead Co. v. Shipley Co. (1929), 207 Cal. 414 at 421, 278 Pac. 1038 at 1042;

Seeger v. Odell (1941), 18 Cal. (2d) 409, 417-418, 115 Pac. (2d) 977, 982;

Lawrence v. Ducommun (1936), 14 Cal. App. (2d) 396 at 399, 58 Pac. (2d) 407, 408.

In *Michaels v. Pacific Soft Water Laundry,* 104 Cal. App. 349, 360 to 361, 286 Pac. 165 at 170, which was cited by appellee Chandis in support of its argument, the California District Court of Appeal stated that a failure to make any offer to restore is not fatal to plaintiff's cause of action, because the suit being in equity, "the court may do exact justice between the parties and is not limited to the offers and demands of the pleadings;" the court further stated that the court's "decree can fully adjust the equities between the parties."

Appellants therefore submit that the judgment should be reversed and relief granted as prayed in the complaint.

Respectfully submitted,

W. H. Abel,

O. C. Moore,

Frederick D. Anderson,

Attorneys for Appellants.

No. 10094

United States

Circuit Court of Appeals

For the Ninth Circuit.

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, Owners of DIESEL SCREW "BLUE SKY", her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

For Appellants:

LASHER B. GALLAGHER, Esq.,
458 South Spring Street,
Los Angeles, California.

For Appellee:

DAVID A. FALL, Esq.,
333 West Sixth Street,
San Pedro, California. [1*]

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 831-B

DIESEL SCREW "BLUE SKY", TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

CITATION

United States of America—ss.
To John Evanisevich, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals

*Page numbering appearing at foot of page of original certified Transcript of Record.

for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of April, A. D. 1942, pursuant to an order allowing appeal filed on Feb. 28th, 1942, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 831-B, Central Division, wherein Diesel Screw "Blue Sky", Tom Mason, Marco Cvitanich and Mitchell Cvitanich are appellants and you are appellee, to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Campbell E. Beaumont, United States District Judge for the Southern District of California, this 28th day of February, A. D. 1942, and of the Independence of the United States, the one hundred and sixty Sixth.

C. E. BEAUMONT,
U. S. District Judge for the Southern District of California.

Service of a copy of the foregoing Citation is acknowledged this 4th day of March, 1942. Also copies of petition for appeal, order allowing appeal, notice of appeal and assignment of errors.

DAVID A. FALL,
Attorney for Appellee.

[Endorsed]: Filed Mar. 10, 1942. [2]

[Title of District Court and Cause.]

LIBEL IN REM IN ADMIRALTY

To the Honorable Judges of the District Court of the United States, Southern District of California, Central Division,

In Admiralty.

The libel of John Evanisevich, late a fisherman seaman on board the Diesel Screw "Blue Sky", whereof Tom Mason, now is and has been at all times herein mentioned, master, against the said ship, her tackle, apparel, engines, furniture, etc., in a cause of wages, civil and maritime, alleges as follows:

First. That sometime in the month of August of 1939, the said Diesel Screw "Blue Sky", then lying in the Port of Los Angeles, destined for a six months' sardine fishing season, the then master, Tom Mason, by himself, hired this libelant as a fisherman seaman for the said season, on the one seventeenth la*w* or share of what should be taken, as wages, and this libelant then accepted and entered into his duties as a member of the crew of the said "Blue Sky."

Second. That on or about the 1st day of September 1939, [3] this libelant entered into the duties as a member of the crew of said ship, preparing said ship and nets for the season.

Third: That on the *22th* day of September, 1939, just before the said ship started upon its fishing

for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 9th day of April, A. D. 1942, pursuant to an order allowing appeal filed on Feb. 28th, 1942, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 831-B, Central Division, wherein Diesel Screw "Blue Sky", Tom Mason, Marco Cvitanich and Mitchell Cvitanich are appellants and you are appellee, to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

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DAVID A. FALL,
Attorney for Appellee.

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First. That sometime in the month of August of 1939, the said Diesel Screw "Blue Sky", then lying in the Port of Los Angeles, destined for a six months' sardine fishing season, the then master, Tom Mason, by himself, hired this libelant as a fisherman seaman for the said season, on the one seventeenth la*w* or share of what should be taken, as wages, and this libelant then accepted and entered into his duties as a member of the crew of the said "Blue S*l*y."

Second. That on or about the 1st day of September 1939, [3] this libelant entered into the duties as a member of the crew of said ship, preparing said ship and nets for the season.

Third: That on the *22th* day of September, 1939, just before the said ship started upon its fishing

season for Sardines, and while this libelant was engaged in the service of his said ship, and while it was then lying in the navigable waters of the Port of Los Angeles, and while doing his duty and obeying the commands of the master, slipped from a ladder on said ship, severely injuring his left arm and shoulder. That it became necessary immediately thereafter that libelant go under the treatment of a physician and surgeon. That ever since said date libelant has been unable to use his said arm by reason of the injuries sustained on said date, and still remains under the care of a physician and surgeon for the treatment of said injuries. That libelant will be completely disabled from work for a long and indeterminate period of time as a result of said injuries and will necessarily be under the care of a physician and surgeon for the treatment of said injuries for a long and indeterminate period of time.

Fourth: That while this libelant has so been confined and unable to work, the said ship engaged in fishing during the proposed sardine season and during said season the ship took and caught a great quantity of sardines, which libelant is informed and believes and alleges that his one seventeenth lay or share of said catch being worth the sum of Twelve Hundred ($1200.00) Dollars and upwards, which the master and owners of the said ship have hitherto refused and still refuse to pay, to the great damage of the libelant.

Fifth. That by reason of the injuries so received in the service of the said vessel, as above stated, libelant's left arm has been left useless, and by reason thereof has been put to great expense for the services of a physician and surgeon. That *at* the [4] libelant is informed that the reasonable cost of the services of the physician and surgeon for and to this date is the sum of One Hundred Seventy-Five ($175.00) Dollars.

Sixth: That the said Diesel Screw "Blue Sky", is an American vessel and now is and will be in and during the currency of process herein, within the District of Southern California, and in the jurisdiction of this honorable court.

Seventh. That libelant is a seaman, within the designation of persons permitted to sue herein without furnishing Bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 837, U. S. C. A.

Eighth. That by reason of the injuries as aforesaid libelant claims to be entitled to demand and have the said ship pay his reasonable expenses already incurred and hereafter to be incurred in and about his cure, and his reasonable support since his said injury and till he is cured, which sum is at the rate of Three ($3.00) Dollars per day. That the reasonable amount accrued for such support to this date is Five Hundred Seventy ($570.00) Dollars.

Ninth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of this Honorable Court. In verification whereof, if denied, the libelant craves leave to refer to the depositions and other proofs to be by him exhibited in this cause.

Wherefore the libelant prays that process in due form of law, according to the course of this Honorable Court in causes of Admiralty and Maritime jurisdiction, may issue against the said vessel, her tackle, apparel, engines and furniture, and that all persons, having or pretending to have any right, title or interest therein, may be cited to appear and to answer all and singular the [5] matters hereinbefore set forth, and that this Honorable Court may be pleased to decree the payment of the wages and the expenses of care and maintenance, as well as wages by the share, as aforesaid, with costs, and that the libelant may have such other relief in the premises as in law and justice he may be entitled to receive.

DAVID A. FALL
333 W. 6th St. San Pedro.
Phone 2811
Proctor for Libelant. [6]

State of California,
County of Los Angeles—ss.

John Evanisevich, being first duly sworn, deposes and says: That he is the libelant in the above entitled action; that he has read the foregoing libel

and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ JOHN EVANISEVICH

Subscribed and sworn to before me this 29th day of February, 1940.

[Seal] /s/ HORTENSE CLARK,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 2, 1940. [7]

District Court of the United States
Southern District of California

MONITION AND ATTACHMENT

The President of the United States of America

To the Marshal of the United States for the Southern District of California, Greeting:

Whereas, a libel in rem hath been filed in the District Court of the United States for the Southern District of California, on the 2nd day of March, in the year of our Lord one thousand nine hundred and forty, by John Evanisevich, Libelant vs. Diesel Screw "Blue Sky", her tackle, apparel, engines, and furniture, etc., Case No. 831-B Adm., for the reasons and causes in the said Libel mentioned, and praying the usual process and monition of the said

Court in that behalf to be made, and that all persons interested in the said Diesel Screw "Blue Sky" or vessel, her tackle, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said Diesel Screw "Blue Sky" or vessel, her tackle, etc., may for the causes in the said Libel mentioned, be condemned and sold to pay the demands of the Libelant.

You are, therefore, hereby commanded to attach the said Diesel Screw "Blue Sky" or vessel, her tackle, etc., and to detain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said Libel, that they be and appear before the said Court, to be held in and for the Southern District of California, on the 25th day of March, A. D. 1940, at 10:00 o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations on that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness, the Honorable C. E. Beaumont, Judge of said Court, at the City of Los Angeles, in the Southern District of California, this 2nd day of March, in the year of our Lord one thousand nine

hundred and forty, and of our independence the one hundred sixty-fourth.

(Seal) R. S. ZIMMERMAN,
Clerk.
By C. E. HOLLISTER,
Deputy Clerk.

DAVID A. FALL,
333 W. 6th Street,
San Pedro, California,
Proctor for Libelant. [8]

Marshal's Civil Docket No. 21915

No. 831-B Adm.

United States District Court
Southern District of California
Central Division

John Evanisevich

vs.

Diesel Screw "Blue Sky"

Monition returnable March 25, 1940.

In obedience to the within Monition, I attached the Diesel Screw Blue Sky therein described, on the 3rd day of March, 1940, and have given due notice to all persons claiming the same, that this Court will, on the 25th day of March, 1940 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the

trial and condemnation thereof, should no claim be interposed for the same.

ROBERT E. CLARK,
U. S. Marshal.
By C. G. MERTZ,
Deputy.

Dated March 4th, 1940.

[Endorsed]: Filed Mar. 7, 1940.

[Title of District Court and Cause.]

CLAIM

To the Honorable Judges of the District Court of the United States, Southern District of California, Central Division:

The claim of Tom Mason, Marco Cvitanich and Mitchell Cvitanich to the Diesel Screw "Blue Sky" her tackle, apparel, engines, and furniture, etc., now in the custody of the United States Marshal for the Southern District of California, Central Division, at the suit of the libelant above named, alleges:

That said Tom Mason, Marco Cvitanich and Mitchell Cvitanich are the true and bona fide owners of the said Diesel Screw "Blue Sky", her tackle, apparel, engines, and furniture, etc. and that no other persons are the owners thereof and no other person is an owner thereof and the said Tom

Mason, Marco Cvitanich and Mitchell Cvitanich hereby claim the same.

Claimants present and file herewith a bond stipulating payment of costs in the sum of $250.00 which said bond has been executed by an approved corporate surety, to wit, the Fireman's Fund Indemnity Company, a corporation, and claimants file and present herewith a bond in the sum of $4,000.00, which said bond has been executed by an approved corporate surety, to wit, the Fireman's Fund Indemnity Company, a corporation, as suerty and Tom Mason, Marco Cvitanich and Mitchell Cvitanich as principals.

Wherefore claimants pray that this *Honorable approve* said [10] bonds and each of them and claimants further pray that this Honorable Court make and file an order releasing the said Diesel Screw "Blue Sky", her tackle, apparel, engines and furniture, etc., to the claimants upon the approval of said bonds and each thereof.

TOM MASON
MARCO CVITANICH
MITCHELL CVITANICH

LASHER B. GALLAGHER
Proctors for Claimants [11]

State of California,
County of Los Angeles—ss.

Tom Mason, Marco Cvitanich and Mitchell Cvitanich being by me first duly sworn, depose and say: that they are the claimants in the above en-

titled action; that they have read the foregoing claim and knows the contents thereof; and that the same is true of their own knowledge, except as to the matters which are therein stated upon their information or belief, and as to those matters that he believes it to be true.

TOM MASON
MARKO CVITANICH
MICHIEL CVITANICH

Subscribed and sworn to before me this 4th day of March, 1940.

(Seal) ENES SARVELLO

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 4, 1940. [12]

[Title of District Court and Cause.]

ORDER

Whereas, a libel has been filed by the above named libelant against the respondent Diesel Screw "Blue Sky", her tackle, apparel, engines, and furniture, etc., for the reasons and causes in said libel mentioned; and

Whereas, a bond stipulating payment of costs in the sum of $250.00 has been executed by the Fireman's Fund Indemnity Company, a corporation, as surety; and

Whereas, said bond has been filed with the above entitled court; and

Whereas, a bond in the sum of $4,000.00 has been executed by the Fireman's Fund Indemnity Company, a corporation, as surety, and Tom Mason, Marco Cvitanich and Mitchell Cvitanich as principals; and

Whereas, said bond has been filed with the above entitled court, and the said bond being conditioned that in the event of failure of the principals Tom Mason, Marco Cvitanich and Mitchell Cvitanich to abide by all orders of this court made or to be made herein, then said surety will pay the amount ordered by the final decree, not exceeding the penal sum of $4,000.00; and

Whereas, said bonds have been and each of them is hereby approved by the court; [13]

It is hereby ordered that the Diesel Screw "Blue Sky", her tackle, apparel, engines and furniture, etc., be forthwith released to the claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

Done in open court this 4th day of March, 1940.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Mar. 4, 1940. [14]

[Title of District Court and Cause.]

STIPULATION AND BOND FOR RELEASE

Know All Men by These Presents:

Whereas, the above named Libelant has filed, or is about to file herein, a libel upon a certain claim

in the total amount of Nineteen Hundred Forty-five and no/100 Dollars ($1945.00) against the Diesel Screw "Blue Sky", her tackle, apparel, engines, furniture and etc., Respondent, and

Whereas, said Diesel Screw "Blue Sky" has been, or is about to be, seized and attached by the United States Marshal for the Southern District of California, under and by virtue of process issued by the above entitled Court; and,

Whereas, Tom Mason, Marco Cvitanich and Mitchell Cvitanich have filed, or are about to file, a claim to said Diesel Screw "Blue Sky" as owners thereof, and a Stipulation for Costs in the usual form; and are applying for the release of said Diesel Screw from said seizure and attachment, all in accordance with the Admiralty rules and practice of the above entitled Court; and

The parties hereto hereby consenting that in case of default or contumacy on the part of the Principal or Surety, execution to the amount of Four Thousand and no/100 Dollars ($4,000.00) may issue against their goods, chattels and land.

Now, therefore, the said Tom Mason, Marco Cvitanich and Mitchell [15] Cvitanich, as Principal, and Fireman's Fund Indemnity Company, a corporation, qualified to act as a surety in this Court, as Surety, are held and firmly bound unto Robert E. Clark, United States Marshal for the Southern District of California, his successors, heirs, executors, administrators and assigns, and unto Libelant herein, in the full sum of Four Thousand and

no/100 Dollars ($4,000.00), for the payment of which sum the said Principal and Surety bind themselves, their respective successors and assigns, firmly by these presents; the condition of this obligation being such that if the said Tom Mason, Marco Cvitanich and Mitchell Cvitanich, as Principal herein, shall abide by and perform all orders of this Court in said cause, interlocutory or final, and shall pay whatever amount may be awarded against said Tom Mason, Marco Cvitanich and Mitchell Cvitanich herein by the final decree rendered in said cause by this Court, or by an Appellate Court, if an appeal intervene, with interest, (not exceeding the said full penal sum of Four Thousand and no/100 Dollars ($4,000.00), then this obligation to be void; otherwise, the same shall remain in full force and effect.

In witness whereof, the said parties hereto have hereunto affixed their hands and seals this 4th day of March, 1940.

TOM MASON
MARKO CVITANICH
MICHIEL CVITANICH
Principal
FIREMAN'S FUND INDEMNITY COMPANY
(Seal) By L. H. SCHWOBEDA
Attorney-in-Fact

State of California,
County of Los Angeles—ss.

On this 4th day of March in the year one thousand nine hundred and forty before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and [16] sworn, personally appeared L. H. Schwobeda known to me to be the Attorney in Fact of Fireman's Fund Indemnity Company the company described in and that executed the within and foregoing instrument, and known to me to be the person who executed the said instrument on behalf of the said company, and he duly acknowledged to me that such company executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the said County of Los Angeles the day and year in this certificate first above written.

(Seal) M. E. BEETH
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 23, 1941.

Examined and recommended for approval as provided in Rule 28.

LASHER B. GALLAGHER
Proctors for Claimants

I hereby approve the foregoing bond this 4th day of March 1940.

PAUL J. McCORMICK
United States District Judge

[Endorsed]: Filed Mar. 4, 1940. [17]

[Title of District Court and Cause.]

ANSWER

Come now the respondent and claimants and answer the libel on file herein as follows:

Article I

Answering the first article: Deny that libelant was, at any time, employed as a seaman and deny that libelant was or is a seaman and deny that libelant was hired as a member of the crew of the "Blue Sky" and deny that he was or is entitled to any lay or share as wages, or otherwise.

Article II

Answering the second article: Deny that on the 1st day of September, 1939, or at any other time, the libelant entered into the performance of any duty as a member of the crew of the "Blue Sky" and allege that the only duties which the libelant performed were those customarily performed by a fisherman.

Article III

Answering the third article: Deny that at any time the libelant was injured while engaged in the service of the "Blue *Sea*" and deny that at any time or place, when or where libelant sustained any injury, he was performing any duty or obeying any command of the master or that while in the service of the ship he slipped from a ladder or severely, or at all, injured his left arm or [18] shoulder. Respondent and claimants have no information or

belief upon the subject sufficient to enable them, or any of them, to answer the balance of the allegations in the third article and placing their denial thereof upon said ground, deny said allegations and each thereof.

Article IV

Answering the fourth article: Allege that prior to the commencement of the Sardine season in 1939, the libelant sustained some injury and that thereafter and while the libelant was absent from said ship and while he was performing no duty of any kind or character, the said ship took and caught Sardines, but deny that the libelant was or is entitled to a one-seventeenth lay or share or any percentage or share of any catch and deny that the libelant was entitled to any share or lay, either in the sum of $1200.00, or in any other sum whatsoever or at all.

Article V

Answering the fifth article: Respondent and claimants have no information or belief upon the subject sufficient to enable them, or any of them, to answer the allegations set forth in the fifth article and placing their denial thereof upon said ground, deny said allegations and each thereof and deny that the cost of the services of any physician or surgeon was or is the sum of $175.00 or any other sum whatsoever or at all.

Article VI

Answering the sixth article: Respondent and claimants admit the allegations thereof.

Article VII

Answering the seventh article: Deny that libelant is a seaman or is within the designation of persons permitted to sue herein without furnishing bond for or prepayment of or making deposit to secure fees or costs either for the purpose of entering in or prosecuting suits conformable to the provisions of Title 28, [19] Sec. 837, U.S.C.A., or otherwise.

Article VIII

Answering the eighth article: Deny that the libelant is entitled to demand or to have the ship pay any expense incurred or hereafter to be incurred, in or about his cure or his support, or that the libelant is entitled to demand or have the ship pay therefor, or at all, at the rate of $3.00 or any other rate per day, or otherwise. Deny that the sum of $570.00 or any other sum is a reasonable amount for support.

Article IX

Answering the ninth article: Deny that all of the premises are, or that any premise is true or within the admiralty or maritime jurisdiction of this Court and allege that the type of fishing done by the "Blue Sky" was purely local in character and that claim, if any, of the libelant was and is within the jurisdiction of the Industrial Accident Commission of the State of California.

Wherefore, respondent and claimants pray that libelant take nothing by his said libel and that respondent and claimants recover their costs herein

and such other and further relief as to the court may seem just and equitable.

LASHER B. GALLAGHER
Proctor for Respondent
and Claimants [20]

State of California,
County of Los Angeles—ss.

Tom Mason being by me first duly sworn, deposes and says: that he is one of the claimants in the above entitled action; that he has read the foregoing answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true. Affiant makes this verification on his own behalf and on behalf of his co-claimants and on behalf of respondent.

TOM MASON

Subscribed and sworn to before me this 18 day of March, 1940.

(Seal) W. D. BOWER

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 18, 1942.

[Endorsed]: Filed Mar. 19, 1940. [21]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT

Judgment is ordered for libelant for "lay" of season's sardine catch, which amount may be agreed upon by parties. If it cannot be so agreed upon, then the court will reopen case for receiving further testimony regarding such amount.

The court is of the opinion that a reasonable offer of hospital service was made to libelant, and that he refused such offer.

Libelant has failed to show expenditure or incurrence of any sum for maintenance.

March 29, 1941.

BEAUMONT, J.

[Endorsed]: Filed Mar. 31, 1941. [24]

[Title of District Court and Cause.]

STIPULATION AS TO REASONABLE VALUE OF MAINTENANCE

It is stipulated by and between the Libelant and Respondent above named, by and through their respective counsel, that in the event the above entitled Court finds that libelant herein is entitled to recover maintenance, the reasonable value of such maintenance is $1.50 per day.

It is expressly understood that this stipulation

is not an agreement by respondent that libelant is entitled to recover maintenance.

Dated: August 2, 1941.

(s) LASHER B. GALLAGHER
Proctor for Respondent

(s) DAVID A. FALL
Proctor for Libelant

[Endorsed]: Filed Oct. 8, 1941. [24a]

ORDER

At a stated term, to wit: The September Term, A. D. 1941, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 8th day of October in the year of our Lord one thousand nine hundred and forty-one.

Present: The Honorable C. E. Beaumont,
District Judge.

[Title of Cause.]

David B. Fall, Esq., appearing for the libelant, and Lasher B. Gallagher, Esq., appearing for the claimants and respondents, come before the Court, and Attorney Gallagher states that the parties to this action have stipulated that the amount of the share is $1,130.70, but that he objects to the intro-

duction of said fact in evidence upon the ground that there is no proof showing that libelant was injured while in the service of the vessel and so forth. The Court overrules objection and allows exception to respondents.

Counsel state that there is lack of agreement on what took place at the hearing on July 21, 1941, and Attorney Gallagher requests record show his objection to the making of the order reopening the case, states his grounds, and argues. The Court overrules the objection and allows exception to respondents. The case is ordered reopened for further evidence to be presented either by stipulation or by testimony in court. Exception allowed respondents.

Attorney Fall files stipulation as to the reasonable amount of maintenance if allowed. Attorney Gallagher objects to the introduction of the stipulated fact in evidence, states grounds and argues. The Court overrules objection. Exception to respondents.

The case now being finally submitted to the Court for decision, the Court orders judgment for the libelant. Attorney Gallagher requests special findings of fact as to each separate allegation of the libel, and it is ordered that Attorney Fall present findings and form of judgment in accordance with previous order of the Court and stipulation filed this date. [24b]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having come on regularly to be heard on the pleadings and proofs and having been argued and submitted by the advocates for the respective parties, the court finds the facts as follows:

I.

That it is true that sometime in the month of August 1939, the Diesel Screw "Blue Sky", was then lying in the Port of Los Angeles, destined for a six months sardine fishing season, and the then Master Tom Mason, by himself, hired this libelant as a fisherman seaman for the said season, on the one seventeenth lay or share of what should be taken, as wages, and this libelant then accepted and entered into his duties as a member of the crew of the said "Blue Sky".

II.

That it is true that on or about the 1st day of September, 1939 the libelant entered into the duties as a member of the crew of said ship, preparing said ship and nets for the season;

III.

That it is true that on the 22nd day of September. [25] 1939, just before the said ship started upon its fishing season for sardines, and while the libelant was engaged in the service of his said ship

in that he was in the act of departing from said ship after performance of his duties as a member of said ship's crew and while he was subject to call of duty as a member of the crew of said ship which was then and there lying in the navigable waters of the Port of Los Angeles, slipped from a ladder and part of the equipment of said ship, and the adjoining wharf, severely injuring his left arm and shoulder. That it is true that it became necessary within four days thereafter for libelant to go under the treatment of a physician and surgeon for said injuries. That from the date of injury to July 12, 1940, libelant was unable gainfully to use his said arm by reason of the injuries so sustained and was under the care of a physician and surgeon for the treatment of said injuries during said period of time.

IV.

That it is true that while this libelant was so confined and unable to work, the said ship engaged in fishing until about the first of March, 1940, the period of the proposed sardine season, and during said season the ship took and caught a great quantity of sardines, of which the libelant's one seventeenth lay or share was worth the sum of $1,130.78, which the master and owners of the said ship refused to pay to the libelant.

V.

That it is true that by reason of the injuries so received in the service of said vessel, as aforesaid,

libelant's left arm was useless and incapacitated until the 12th day of July, 1940, and by reason thereof he was put to the expense of $347.00 for a physician's services, but said libelant waived his right to recover for said expense by reason of his failure to accept the tender of medical care through a certificate to the Marine Hospital tendered the libelant by the Master of the "Blue Sky". [26]

VI.

That it is true that the said Diesel Screw "Blue Sky" is an American vessel and was during the currency of process herein, within the District Court of Southern California, and in the jurisdiction of this court.

VII.

That it is true that the libelant is a seaman, within the designation of persons permitted to sue herein without furnishing Bond for, or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 837, U.S.C.A.

VIII.

That it is true that by reason of the injuries as aforesaid libelant is entitled to demand and have the said ship pay his reasonable expenses incurred in and about his support from the date of injury to the 12th day of July, 1940, which said sum is at the rate of One and 50/100 ($1.50) Dollars per day, and the amount due libelant from the 22nd day

of September, 1939 to July 12, 1940, is the sum of Four Hundred Thirty-one ($431.00) Dollars, total amount thereof accruing on July 12, 1940, with interest at the rate of seven (7%) percent per annum from said date.

IX.

That it is true that all and singular the premises are true, and within the admiralty jurisdiction of this honorable court.

From the foregoing, the court concludes that:

I.

The libelant is entitled to a judgment against respondent in the sum of One Thousand One Hundred Thirty and 78/100 ($1,130.78) Dollars as wages for the sardine season ending on or about the 1st day of March, 1940, with interest thereon from [27] said March 1, 1940, at the rate of 7% per annum, and for the additional sum of $431.00, as maintenance from September 22nd, 1939, to July 12, 1940, with interest thereon from July 12, 1940, at the rate of 7% per annum.

II.

That libelant is not entitled to recover for his expenses incurred for the treatment of his injuries.

III.

That upon motion of libelant a Final Decree shall be entered in accordance herewith providing therein that the decree be satisfied or an appeal be taken

therefrom within ten days after service of Notice of Entry of said decree on the claimant or his proctor, or the stipulators for costs and value on the part of the said Diesel Screw "Blue Sky", shall cause the engagements of their stipulations to be performed, or show cause within four days after said ten days, or on the first day of jurisdiction thereafter, why execution should not issue against them, their goods, chattels and lands, to satisfy the decree.

Dated: February 20th, 1942.

C. E. BEAUMONT,
United States District Judge.

[Endorsed]: Filed Feb. 20, 1942 [28]

In the United States District Court, Southern District of California, Central Division.

In Admiralty No 831-B

JOHN EVANISEVICH,

Libelant,

vs.

DIESEL SCREW "BLUE SKY", her tackle, apparel, engines, and furniture, etc.,

Respondent.

FINAL DECREE

This cause having come on regularly to be heard on the pleadings and proofs and having been argued

and submitted by the advocates for the respective parties, and due deliberation having been had, it is now, on motion of David A. Fall, Proctor for libel ant,

Ordered, Adjudged and Decreed, that the libelant recover of and from the respondent herein the sum of One Thousand One Hundred Thirty and 78/100 ($1,130.78) Dollars, with interest thereon from the 1st day of March, 1942, at seven (7%) per cent per annum, amounting to $156.15; and a further sum of Four Hundred Thirty-one ($431.00) Dollars, with interest thereon from the 12th day of July, 1942, at seven (7%) per cent per annum, amounting to $43.38 and costs of libelant taxed in the sum of $59.81, all to the sum of ....., with interest thereon at the rate of seven (7%) per cent per annum until paid, and it is further

Ordered, Adjudged and Decreed that unless this decree be satisfied or an appeal taken therefrom within ten days after service of Notice of Entry of this decree on the claimant [29] or his proctor, the stipulators for costs and value on the part of the claimant of the said Diesel Screw "Blue Sky" cause the engagements of their stipulations to be performed, or show cause within four days after said ten days, or on the first day of jurisdiction thereafter, why executions should not issue against them, their goods, chattels and lands, to satisfy this decree.

Dated: December 20, 1941.

C. E. BEAUMONT,
United States District Judge.

Not approved as to form as provided in Rule 44, for reasons stated in letter to Judge in re findings.

LASHER B. GALLAGHER,
Proctor for Claimant and Respondent.

[Endorsed]: Judgment entered Feb. 20, 1942. Docketed Feb. 20, 1942. Min. Book 25, Page 528.

R. S. ZIMMERMAN,
Clerk.
By R. B. CLIFTON,
Deputy.

Interest inserted pursuant to order of 3/4/42. Mar. 4, 1942.

R. S. ZIMMERMAN,
Clerk U. S. District Court,
Southern District of California.
By R. B. CLIFTON,
Deputy.

[Endorsed]: Filed Feb. 20, 1942 [30]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Campbell E. Beaumont, Judge of the United States District Court, Southern District of California, Central Division:

Respondent Diesel Screw "Blue Sky" and the claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich, and each of them, respectfully pray that they and each of them may be permitted to take an appeal from the final decree entered in the above court on the 20th day of February, 1942, to the United States Circuit Court of Appeals, for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith and your petitioners desire to supersede the execution of said final decree, and herewith tender a bond in such amount as the court may require for such purpose, and pray that a supersedeas be allowed as part [31] of the allowance of said appeal and the amount of the bond fixed so as to operate as a supersedeas.

Dated at Los Angeles, California, this 28th day of February, 1942.

LASHER B. GALLAGHER,
Proctor for Respondent and Claimants.

[Endorsed]: Filed Feb. 28, 1942. [32]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now come the respondent Diesel Screw "Blue Sky" and the claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in finding that while the libellant was engaged in the service of his said ship he slipped from a ladder and part of the equipment of said ship and the adjoining wharf, severely injuring his left arm and shoulder.

II.

The District Court erred in finding that at the time of libellant's injury he was engaged in the service of his ship. [33]

III.

The District Court erred in finding that the libellant was injured while he was subject to any call of duty as a member of the crew of the "Blue Sky".

IV.

The District Court erred in failing to make any finding whatever with reference to the issue that the libellant was injured while doing his duty and obeying the commands of the master of the vessel.

V.

The District Court erred in not finding in accordance with the uncontradicted evidence that the

libellant was not in the service of the ship at the time of his injury.

VI.

The District Court erred in not finding in accordance with the uncontradicted evidence that the libellant, on the day of the accident, had completed any and all possible service to the ship at a time not later than 12 o'clock noon and that for the sole and exclusive pleasure of the libellant he unnecessarily loitered and remained on the vessel until sometime between 1:30 P. M. and 2 P. M. of said day.

VII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of fish caught and sold during the Sardine season subsequent to September 22nd, 1939.

VIII.

The District Court erred in finding that the libellant is entitled to demand and have the ship pay his expenses incurred in and about his support from September 22nd, 1939, to July 12th, 1940. [34]

IX.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any time whatever.

X.

The District Court erred in finding that there is due the libellant for maintenance, the sum of

$431.00 with interest at the rate of 7% per annum from July 12th, 1940, or for any sum whatever either with or without interest.

XI.

The District Court erred in finding that all and singular or all or singular the premises are true.

XII.

The District Court erred in finding that the premises are within the Admiralty jurisdiction of said court.

XIII.

The District Court erred in finding that the libellant was entitled to a 1/17 lay or share of the entire proceeds of the Sardine season subsequent to September 22nd, 1939, for the reason that the Sardine season included many voyages and if a seaman is injured while in the service of a vessel he is entitled at most to wages only to the end of a particular voyage and is not entitled to wages to the end of the period of employment which may have been agreed upon and which may include many voyages.

XIV.

The District Court erred in finding that the subject of the action was within the Admiralty jurisdiction for the reason that the exclusive remedy of the libellant was within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission. [35]

XV.

The District Court erred in concluding that libellant is entitled to a judgment against respondent in the sum of $1130.78 as wages for the Sardine season ending on or about the 1st day of March, 1940, with interest thereon from said March 1st, 1940, at the rate of 7% per annum and for the additional sum of $431.00 as maintenance from September 22nd, 1939, to July 12th, 1940, with interest thereon from July 12th, 1940, at the rate of 7% per annum.

XVI.

The District Court erred in not concluding that the libellant is not entitled to recover any sum whatsoever from the respondent "Blue Sky" or from the claimants, or any of them, and in not concluding that the libel should be dismissed with costs to the respondent and claimants.

Dated: Los Angeles, California, this 28th day of February, 1942.

LASHER B. GALLAGHER,
Proctor for Respondent and
Claimants.

[Endorsed]: Filed Feb. 28, 1942 [36]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of respondent Diesel Screw "Blue Sky" and claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich, for an appeal from the final decree entered in the above entitled cause on the 20th day of February, 1942, is hereby granted and the appeal is allowed.

It Is Further Ordered that a certified transcript of the record herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and

It Is Further Ordered that upon petitioners filing a bond in the sum of Three Thousand Five Hundred Dollars ($3,500.00), with sufficient surety or sureties and conditioned as required by law, the same shall operate as a supersedeas of the decree made and entered in the above cause, and shall suspend and stay all further [37] proceedings in this court until the determination of said appeal to the said United States Circuit Court of Appeals.

Dated at Los Angeles, California, this 28th day of February, 1942.

C. E. BEAUMONT,
United States District Judge.

[Endorsed]: Filed Feb. 28, 1942. [38]

[Title of District Court and Cause.]

BOND ON APPEAL

(Supersedeas and for Costs.)

Know All Men By These Presents:

Whereas, respondent Diesel Screw 'Blue Sky'' and claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich have, and each thereof has appealed or is about to appeal from that certain final decree heretofore made and entered in the above entitled cause on February 20th, 1942; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the libellant herein and unto whom it may concern in the sum of Three Thousand Five Hundred Dollars ($3,500.00), for the payment of which well and truly to be made it does hereby bind itself, its successors and assigns firmly by these [39] presents and agrees that in case of default or contumacy on the part of the said appellants, Diesel Screw "Blue Sky", Tom Mason, Marco Cvitanich or Mitchell Cvitanich, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named appellants shall prosecute their appeal with effect and answer all damages and costs if they fail to make their plea good, then this obligation shall ve void; otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, this 28th day of February, 1942.

FIREMAN'S FUND INDEMNITY COMPANY.
By L. H. SCHWOBEDA,
Attorney-In-Fact.

Examined and recommended for approval as provided in Rule 13.

LASHER B. GALLAGHER,
Proctor for Appellants.

I hereby approve the foregoing bond this 28th day of February, 1942.

C. E. BEAUMONT,
U. S. District Judge [41]

State of California,
County of Los Angeles—ss.

On this 28th day of February, 1942, before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared L. H. Schwobeda known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of

Fireman's Fund Indemnity Company

and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said

County of Los Angeles the day and year in this certificate first above written.

(Seal) M. E. BEETH,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires March 23, 1945 [40]

[Title of District Court and Cause.]

NOTICE OF FILING BOND ON APPEAL

(Affidavit of Service by Mail—1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

T. Johnson, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business (residence) address is: 458 South Spring St. Los Angeles, California, that on the 6th day of March, 1942, affiant served the within Notice of Filing Bond on Appeal on the libellant in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said libelant at the office address of said proctor, as follows:* "David A. Fall, Esq., 333 West Sixth St., San

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*Here quote from envelope name and address of addressee.

Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or** (and) there is a regular communication by mail between the place of mailing and the place so addressed.

T. JOHNSON.

Subscribed and sworn to before me this 6th day of March, 1942.

(Seal) ENES SARVELLO,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Feb. 28, 1942. [42]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The respondent and claimants hereby appeal and each of them appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this court entered herein on the 20th

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**When the letter is addressed to a post office other than "Los Angeles," strike out "and"; when addressed to "Los Angeles," strike out "or."

day of February, 1942, and from each and every part of said decree.

Dated: February 28th, 1942.

LASHER B. GALLAGHER,
Proctor for Respondent and
Claimants.

[Endorsed]: Filed Feb. 28, 1942 [43]

[Title of District Court and Cause.]

NOTICE OF FILING BOND ON APPEAL

To the libellant and to his Proctor David A. Fall, Esq:

You and Each of You Will Please Take Notice that the bond on the appeal herein was approved by the Honorable C. E. Beaumont, and was filed in the office of the Clerk of the District Court of the United States, for the Southern District of California, Central Division, on the 28th day of February, 1942, and said bond was executed and given by the Fireman's Fund Indemnity Company, a corporation, authorized to execute surety bonds pursuant to the laws of the State of California and said bond is by reference thereto made a part hereof and a copy of said bond is attached hereto and marked Exhibit "A".

Dated: Los Angeles, California, this 6th day of March, 1942.

LASHER B. GALLAGHER,
Proctor for Respondent and
Claimants. [44]

[Title of District Court and Cause.]

(Affidavit of Service by Mail—1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

T. Johnson, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 458 South Spring St., Los Angeles, California, that on the 6th day of March, 1942, affiant served the within Notice of Filing Bond on Appeal on the Libellant in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said libellant at the office address of said proctor, as follows:* "David A. Fall, Esq., 333 West Sixth St., San Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los An-

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*Here quote from envelope name and address of addressee.

geles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or** (and) there is a regular communication by mail between the place of mailing and the place so addressed.

T. JOHNSON.

Subscribed and sworn to before me this 6th day of March, 1942.

(Seal) ENES SARVELLO,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 6, 1942. [45]

[Title of District Court and Cause.]

PRAECIPE

To the Clerk of the above entitled Court:

I hereby request that the record on appeal in the above entitled cause include the following:

1. Libel
2. Claim of Tom Mason, Marco Cvitanich and Mitchel Cvitanich.

**When the letter is addressed to a post office other than "Los Angeles," strike out "and"; when addressed to "Los Angeles," strike out "or."

3. Order releasing Diesel Screw "Blue Sky" her tackle, apparel, engines and furniture etc. to claimants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

4. Answer of respondent and claimants.

5. Opinion and order for judgment filed March 31st, 1941.

6. Findings of fact and conclusions of law.

7. Final decree.

8. Petition for appeal.

9. Assignment of errors. [46]

10. Order allowing appeal.

11. Supersedeas and cost bond.

12. Notice of appeal.

13. Citation and service of citation, copies of petition for appeal, notice of appeal and assignment of errors.

14. Notice of filing bond on appeal and affidavit of service by mail.

15. Testimony of libellant taken in court of:

Dr. J. H. McCracken
Tom Mason
John Evanisevich
Marco Bodich

16. All of libellant's exhibits.

17. Testimony of claimants and respondent taken in court of:

Jack Fabulich
Jerry Marinkovich
Mate Marinkovich

Marko Cvitanich
Tom Mason
Jack Joncich

18. All of respondent's exhibits.

19. Statement of proctor for libellant as shown in Reporter's Transcript, from and including line 1, page 145 to and including line 10, page 146.

20. Stipulations between proctors, from and including line 20, page 173, to and including line 1, page 176 of Reporter's Transcript.

21. All written stipulations which have been or shall be entered into by and between proctors for the respective parties, and orders of the United States District Court based thereon, prior to the completion and transmittal of the record on appeal to the Clerk of the Circuit Court of Appeals for the Ninth Circuit. [47]

22. Praecipe and affidavit of service by mail.

Dated: Los Angeles, California, this 9th day of March, 1942.

LASHER B. GALLAGHER,
Proctor for Respondent and
Claimants.

(For Affidavit of Service by Mail: See back of Cover.) [48]

[Title of District Court and Cause.]

(Affidavit of Service by Mail—1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

T. Johnson, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business (residence) address is: 458 South Spring St., Los Angeles, California, that on the 9th day of March, 1942, affiant served the within praecipe on the libellant in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said libellant at the office address of said proctor, as follows:* "David A. Fall, Esq., 333 West Sixth St., San Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed or** (and) there is

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*Here quote from envelope name and address of addressee.

**When the letter is addressed to a post office other than "Los Angeles," strike out "and"; when addressed to "Los Angeles," strike out "or."

a regular communication by mail between the place of mailing and the place so addressed.

T. JOHNSON.

Subscribed and sworn to before me this 9th day of March, 1942.

(Seal) ENES SARVELLO,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 10, 1942. [49]

LIBELLANT'S EXHIBIT No. 1

14) It is agreed by the parties hereto that when crew members are hired, they are hired for the season and may be discharged only for good cause shown. This is the acknowledged custom in the fishing industry on the Pacific Coast.

(A) It is further agreed that any member of the crew who fails to bring the boat to its home port as provided herein shall pay the owner the sum of $24.00 who may hire someone in his stead and should the owner sell or charter said boat and not return same to its home port, then in that event the owner agrees to pay the crew transportation in the amount of $24.00 provided, however, said member or said crew wishes to return to said port. If no additional men are [54] hired to man said boat back to its home port then the amount collected

by said owner shall be equally divided among the members of the crew on said boat. [55]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, R. S. Zimmerman, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 58 inclusive contain the Original Citation and full, true and correct copies of: Libel in Rem; Monition and Attachment with Return of Service; Claim of Owners; Order for Release of Vessel; Bond for Release; Answer of Respondent and Claimants; Amendment to Answer; Orders for Judgment; Stipulation as to Value of Maintenance; Findings of Fact and Conclusions of Law; Final Decree; Petition for Appeal; Assignment of Errors; Order Allowing Appeal; Bond on Appeal; Notice of Appeal; Notice of Filing Bond on Appeal; Praecipe for Apostles on Appeal; and Original Respondent's Exhibit "A" and Libellant's Exhibit No. 1, which together with the reporter's transcript of testimony transmitted herewith constitute the apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the fees of the clerk for comparing, correcting and certifying the foregoing record amount to $7.55, which amount has been paid to me by Appellants.

Witness my hand and the seal of the said District Court this 21st day of March, A. D. 1942.

[Seal] R. S. ZIMMERMAN,
Clerk.

By: EDMUND L. SMITH,
Deputy.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF TESTIMONY AND PROCEEDINGS ON TRIAL.

Appearances:

DAVID A. FALL, Esq.,
For Libelant.

LASHER B. GALLAGHER, Esq.,
For Respondents.

Los Angeles, California, Wednesday, October 23, 1940.

J. H. McCRACKEN,

a witness called by and on behalf of the Libelant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Fall:

Q. Your name is Dr. J. H. McCracken?

A. That is correct.

Q. Doctor, you are an M.D., are you?

A. I am.

(Testimony of J. H. McCracken.)

Q. From what school are you a graduate?

A. From the Johns Hopkins in Baltimore.

Q. And you are admitted to practice in the State of California? A. I am.

Q. How long have you been practicing in the State of California?

A. Approximately 11 years.

Q. In what particular branch, if any, do you specialize?

A. General practice, with about 50 or 60 per cent industrial surgery.

Q. You have had occasion, in your practice, to treat Mr. Evanisevich?

Mr. Gallagher: Just a moment, if your Honor please. [2*] In view of the fact that this witness is called out of order may I have the benefit of any objections which might possibly be made to the testimony of this witness in the event he were not called out of order? In other words, I believe the testimony will show in this case that a hospital certificate was offered to the libelant, and that he refused it. Under those circumstances I understand the law precludes him from making any claim for either maintenance and cure or for medical expense.

The Court: I don't think that the court can give you any benefit, Mr. Gallagher, that you don't have. If the law gives it to you, you are entitled to it.

[*Page numbering appearing at top of page of original Reporter's Transcript.]

(Testimony of J. H. McCracken.)

Mr. Fall: Will you read the question?

(Question read by the reporter.)

A. I have.

Q. When was that, Doctor?

A. I first saw the patient in September of 1939.

Q. What part of September, do you recall?

A. On the 26th.

Q. On the 26th? A. 9/26/39.

Q. Where did you see him, Doctor?

A. I first saw this patient at my office on that date.

Q. At that time did you make an examination of him? A. I did.

Q. What did you observe on your examination? [3]

The Court: What was that date, Doctor, please?

A. That was 9/26/39.

The Court: Will you read the question?

(Question read by the reporter.)

A. The examination revealed considerable swelling and hemorrhage in the soft tissues of the left leg and upper arm, and a diagnosis was made of a severe sprain of the left shoulder.

Q. By Mr. Fall: Did you take the x-rays?

A. I did.

Q. What did the x-rays reveal, if anything?

A. The x-rays were essentially negative, and did not show any fracture into the shoulder joint.

(Testimony of J. H. McCracken.)

Q. Was there any discoloration of the left shoulder or of the arm? A. There was.

Q. What was the nature of that?

A. The discoloration extended from about the mid-clavicle region, about half way between the shoulder and the neck; extended straight to the shoulder and down the arm to the elbow. The patient has stated——

Mr. Gallagher: We will object to any repetition of what the patient stated, if your Honor please, on the ground that it would be hearsay, and would not prove that any event which may have been repeated to the doctor actually took place or occurred.

[5]

Q. By Mr. Fall: I will ask the doctor what, if any, history did you obtain from the patient at that time?

Mr. Gallagher: That is objected to upon the ground it is immaterial, and would not prove any fact about any of the events therein related to the doctor.

The Court: As I understand, it is not offered for that purpose, it is simply offered for the purpose of laying a foundation for the doctor's conclusion.

Mr. Fall: That is correct, your Honor.

The Court: As to his condition only?

Mr. Fall: Yes.

A. The patient stated that on 9/22, four days previous to coming to my office, as I recall it, it was

(Testimony of J. H. McCracken.)

in going off the ship his foot had slipped and his weight fell against the left shoulder, or in trying to support himself it was necessary for him to hold on with the left arm, and his entire weight went against this shoulder.

Q. Did you then give Mr. Evanisevich any treatment?

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that it is immaterial; no proper foundation laid, in this, that there is no evidence proving, or tending to prove, that any service rendered by Dr. McCracken was not available to the libelant by recourse to the Public Health Service utilities maintained by the United States Government, and in support of that objection I call your attention to the decision in the Calmar case. [5]

(Discussion)

The Court: You may proceed with some other phase.

Mr. Fall: As to this witness, your Honor?

The Court: Until the court gets that volume.

Q. By Mr. Fall: Was the man disabled at the time that you first saw him? A. He was.

Q. Did he tell you that his employment was that of a fisherman, seaman? A. He did.

Q. In your opinion how long was the man totally disabled from continuing his work as a fisherman and seaman, as a result of this condition you found on the 26th day of September, 1939?

(Testimony of J. H. McCracken.)

A. Up until approximately the 15th of July, of 1940.

Q. Had the man at that time completely recovered from his injury? A. No, he had not.

Q. What was his condition at that time?

A. May I ask, do you mean the middle of July?

Q. The middle of July of 1940, yes.

A. The patient still had a small amount of atrophy of the muscles of the left upper arm and forearm, and also of the scapula. There was also some limitation on abduction or movement of the arm away from the body laterally.

Q. Was there any other limitation? [6]

A. Backward motion of the arm, trying to place the thumb here up on the back, was also restricted.

Q. Have you examined Mr. Evanisevich lately?

A. I have.

Q. When was the last time you examined him?

A. I examined him on yesterday morning.

Q. Was there any improvement in the condition between last July 15th, and yesterday morning?

A. There was.

Q. Will you tell us the condition you found yesterday morning in your examination?

A. There was no atrophy of the left upper arm or forearm at that time, and only a very slight atrophy of the scapula. The motions have improved considerably since the examination in July, and abduction now is carried out to approximately 120 degrees as compared to 160.

(Testimony of J. H. McCracken.)

Q. The improvement in the amount of atrophy indicates what to you, Doctor?

A. It indicates the patient has been using his arm in order to rehabilitate these muscles of this extremity.

Q. As a matter of fact, you instructed him to use the arm as much as he could? A. I have.

Q. And the fact that the atrophy has been reduced indicates that he has been carrying out your instructions, isn't that so, Doctor? [7]

Mr. Gallagher: That is objected to upon the ground that it calls for surmise and conjecture. It means that he has been taking some exercise, but the doctor can't say that he has followed out all the instructions; the doctor may have instructed him to do a lot of work.

The Court: Read the question.

(Question read by the reporter.)

The Court: Sustained.

Q. By Mr. Fall: If he had not been exercising his arm, and using it, what would you have expected to have found on your examination yesterday, that is between the time of your examination in July and yesterday?

A. Well, we would expect to find a condition similar to that of July, or certainly some atrophy from the disuse of that extremity.

Q. And the change indicates though that he has been using the arm? A. It does.

(Testimony of J. H. McCracken.)

Q. Doctor, in your opinion, is the limitation of motion that you found the first time permanent?

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that it is immaterial. This is not an action for damages for bodily injury. The only issues, as I understand the pleadings, are a claim to share or lay, and a claim for medical services, and a claim for maintenance, and that decision that I called to your attention would [8] preclude the libelant in this case from having any maintenance at this date in any event, or from this date on. There is no allegation anywhere in this libel that he was injured by reason of any failure on the part of the vessel.

(Discussion)

The Court: The Court will overrule the objection. If the Court is later convinced by a consideration of the law that the evidence should not be considered by it, it will be governed accordingly. You may answer.

Mr. Fall: Will you read the question?

(Question read by the reporter.)

A. I can only state it in this way: That during the last few months there has been considerable improvement, and I think there will continue to be improvement in the way of further use of this arm.

Q. Let us go back to the time when you first saw the man, on the 26th day of September. At that

(Testimony of J. H. McCracken.)

time did you treat the man? A. I did.

Mr. Gallagher: That was the same question, if your Honor please, that was brought up, and I assume that the object of this testimony is to find out what his services were worth; is that correct, counsel?

Mr. Fall: Both that, and the necessity of showing that he was disabled.

Mr. Gallagher: So far as the object of the evidence [9] deals with the contention that the libelant is entitled to recover for the cost of services, I object to that part of the evidence upon the ground that there is no evidence proving, or tending to prove, that the type of service which was given by the doctor to the libelant was not available to the libelant by recourse to the facilities of the United States Public Health Service, and as the court said in the Calmar case, particularly the part which I read to your Honor, the court takes judicial notice of the fact that these services are available to seamen, and that they are free of charge, and it seems to me that the plaintiff would first have to show that he could not get those services, or that the type of service which he needed was not available to him by recourse to the federal facilities. Otherwise, that language means nothing.

(Discussion)

The Court: Where you gentlemen are so far apart on your ideas of the law, I think the court should give further consideration to the matter, so

(Testimony of J. H. McCracken.)

this evidence will be received with the same understanding as that heretofore referred to, and the court will overrule the objection.

(Question read by the reporter.)

Mr. Gallagher: I believe, if your Honor please, it is necessary to still take exceptions in these admiralty proceedings, because the rules of civil procedure specifically provide they are not available to admiralty matters; so the respondent will save an exception to the ruling just made [10] by the court.

Q. By Mr. Fall: What was the treatment, Doctor?

Mr. Gallagher: That may be subject to the same objection?

The Court: Yes, if it is agreeable to Mr. Fall.

Mr. Fall: Yes.

Mr. Gallagher: And the same exception?

The Court: The same ruling and, of course, your exceptions are allowed, Mr. Gallagher, without any ruling by the court.

Mr. Fall: I will be willing to stipulate, to save Mr. Gallagher's time and the court's time, that in all this particular examination of the doctor, with reference to treatment given, it may be stipulated that an exception was requested and allowed.

A. The treatment consisted of diathermy and partial immobilization by means of a sling.

Q. How often did he return to your office, if he did return, for treatment?

(Testimony of J. H. McCracken.)

A. He was seen approximately every other day for a period of nine or ten months, up until around the 12th of July of this year.

Q. Did the treatment consist of similar treatment as you have described heretofore?

A. The treatment varied a little bit in that at first it was chiefly diathermy, and later, manipulation with massage, but the diathermy was continued over a period of [11] about nine months.

Q. After the 12th day of July did you request him to return?

A. I did. I asked him to come in occasionally to let me observe the extremity, and to see whether or not there had been any improvement.

Q. Since the 12th day of July have you given him any treatment, or did he return merely for observation?

A. He was seen again on 9/11/40, and again yesterday.

Mr. Gallagher: I move to strike out the answer, if your Honor please, on the ground that it is not responsive to the question, and is extremely ambiguous. Counsel asked him whether he gave him treatment, or he returned merely for observation, and the answer was that he was seen on two occasions. That does not tell whether the doctor treated him or looked at him.

Mr. Fall: Maybe I can have the doctor elaborate.

Q. What was done?

(Testimony of J. H. McCracken.)

A. I can answer that by saying he was examined, and not treated at that time.

Q. With reference to the condition that you find at the present time, you say you expected to find improvement. Is there any improvement, or any particular thing, that should be done to give the man the improvement that you believe you should expect?

Mr. Gallagher: That is objected to upon the ground that [12] it has already been asked and answered, if your Honor please. The doctor has said that there should be improvement by the mere further use of the arm, and no other treatment.

The Court: I think that is what he said.

The Witness: Yes.

Mr. Fall: If that is so I will withdraw the question. I did not recall that.

Q. Doctor, what is the amount of your bill for services that you have rendered to Mr. Evanisevich for this particular injury?

Mr. Gallagher: That is objected to upon the ground that it is immaterial, there being no showing yet to support a finding that it was necessary for the libelant to obtain medical care or attention from any private physician, or that the services which were rendered by the doctor were not available to the libelant by recourse to the United States Public Health Service, free of charge.

The Court: That is embodied in your previous objection, I think, Mr. Gallagher.

(Testimony of J. H. McCracken.)

Mr. Gallagher: Very well.

The Court: And the court stated that it would like to give further consideration to the matter, and that if it reaches the conclusion that it is not to be considered the court will not consider it. You may answer.

Mr. Gallagher: May we have an exception? [13]

A. For the services rendered in the treatment of the patient, it amounts to $347.00.

Q. By Mr. Fall: Doctor, is that the reasonable value of the services so rendered?

A. I think so, yes.

The Court: You say you think so?

A. I will state this: that he has been charged at the rate of $3.00 per treatment, and in this is included the x-rays that were taken earlier.

The Court: The question is, you should know whether that is the reasonable value.

A. It is reasonable, yes.

Q. By Mr. Fall: Doctor, what kind of diathermy was given to Mr.——

A. It was in the form of heat waves that were applied to the shoulder and arm.

Q. Is that short wave diathermy? A. Yes.

Q. Do you know whether or not the United States Public Health Service at San Pedro has a short wave diathermy set?

Mr. Gallagher: That is objected to as calling for the conclusion and opinion of the witness; no foun-

(Testimony of J. H. McCracken.)

dation laid. He would first have to say whether he had been there during the time the treatment was being given, and had been all through the facilities.

Mr. Fall: I asked him whether he knew or not. He can [14] answer the question one way or the other.

The Court: That would ask him to pass on his own qualifications.

Mr. Fall: It is a preliminary question, to determine whether or not they did have short wave diathermy.

The Court: Read the question.

(Question read by the reporter.)

The Court: You may answer.

A. I do not know.

Mr. Fall: That is all.

Mr. Gallagher: No question, except one: What was the date of the last treatment which you actually gave the libelant here?

A. The last treatment was on 7/12/40—July 12th. [15]

TOM MASON,

a witness called by and on behalf of the libelant, having been first duly sworn, testified as follows:

The Clerk: State your name, please.

A. Tom Mason.

Direct Examination

By Mr. Fall:

Q. Mr. Mason, what is your occupation?

A. Fisherman.

Mr. Fall: Incidentally, I am calling this witness as an adverse witness. He is one of the claimants in this case.

Mr. Gallagher: I challenge the right of counsel to do that. This is an in rem proceeding, and the claimant is not, as such, a party to this action.

Mr. Fall: The claimant verified the answer here, and if he certainly is not a party, I ask that the answer be stricken, because he is not a proper person to verify the answer.

(Discussion)

(An adjournment was taken until 1:30 o'clock p. m. of the same day.) [16]

Afternoon Session

1:30 P. M.

Mr. Fall: I believe counsel has become satisfied that his objection would not be well taken, and I understand he has withdrawn it.

Mr. Gallagher: I cannot find any cases, but I can conclude, this being almost the same as a nega-

(Testimony of Tom Mason.)

tive proceeding, that the same rule should apply.

The Court: The court calls attention to the fact that the vessel is named about three different ways in the pleadings. I think the answer calls it the "Blue Sky."

Mr. Gallagher: It is the "Blue Sky."

Mr. Fall: We will stipulate that it is the "Blue Sky."

TOM MASON

recalled.

Direct Examination

resumed.

Q. By Mr. Fall: Mr. Mason, you are the captain of the "Blue Sky," are you?

A. That's right.

Q. And one of the owners thereof?

A. That's right.

Q. Were you captain of the "Blue Sky" during the entire year 1939? A. I was.

Q. During 1939 did you employ Mr. Evanisevich [17] as one of the crew of the "Blue Sky"?

A. Strictly I don't know how to explain that. Really, he came on there through friendship. When he called me from the other boat, he make a motion like this to me, and I looked at him, and I make a motion again like this; and that's the end of it.

The Court: Read the question, Mr. Dewing.

(Testimony of Tom Mason.)

(Question read by the reporter.)

The Court: Do you understand the question?

A. I do.

The Court: Answer yes or no; then you may explain your answer. A. O. K. Yes.

The Court: Now, if you have any explanation you may give it.

A. The explanation, with hiring, I didn't definite tell him yes or no; only through mention through friends. A friend was telling him he got an opening here on my boat, if he wants to come to fish for me.

The Court: After that did he work on the boat?

A. He has.

The Court: After you had, whatever this conversation was, whether by word of mouth, or whatever it was, did he come and work on the boat?

A. Yes, about three months after that.

Q. By Mr. Fall: When did he go to work on the boat? [18] A. April 15.

Q. Then you fished tuna?

The Court: What year? A. 1939.

Q. By Mr. Fall: You employed him for the season, did you, the tuna season?

A. The tuna season, yes.

Q. What did you do when the tuna season finished?

A. We didn't do nothing; stayed idle about ten days.

(Testimony of Tom Mason.)

Q. Then what did you do?

A. Then I call everyone, that we were going to work on the sardine next.

Q. You called the members of your crew together, is that it?

A. I have, and Mr. Evanisevich say he can't come for a day.

Mr. Gallagher: May I have the answer?

(Answer read by the reporter.)

Q. By Mr. Fall: When did that conversation take place? A. The next day, the 16th.

Q. Pardon?

A. The next day of the conversation, the next day that I called everybody to come down on the boat.

Q. What day did you call everybody to come down to the boat?

A. From about September 21. [19]

Q. September 21? A. 1939, yes.

Q. When did you come back from Mexico, at the end of your tuna season?

A. I don't remember right now.

Q. You broke down your clutch, didn't you, while you were in Mexico? A. Yes.

Q. Then you came back and worked fixing the clutch, didn't you?

A. That year it was—I don't remember whether we did that in 1939 or not.

Q. Do you remember that on the morning of the 22nd day of September, of 1939, you had just

(Testimony of Tom Mason.)

repaired the clutch at that time, and you took the boat out to try to see how the clutch was working?

A. No, that was after that.

Q. What did you do on the morning of September 22, 1939?

A. We was working with that.

Q. You were working on it?

A. Yes, hauling the net out of garage down to the wharf.

Q. What did you do the day before?

A. The day before we didn't do anything.

Q. When did you get back from Mexico? [20]

A. I don't remember if I came—from my book I can tell you.

Q. Where is your book?

A. Down at home.

Q. That is in San Pedro? A. Yes.

Q. You can have that here for us tomorrow morning, can't you?

A. No. I have stated the day and everything.

Q. Will you bring that book here tomorrow morning?

Mr. Gallagher: I submit, if your Honor please, if we can get through—this is the fishing season, and they came down for this trial only, and they want to leave this afternoon. I can't see what difference it makes as to the day they fixed the clutch. It doesn't seem material enough to keep the whole crew here.

(Testimony of Tom Mason.)

Mr. Fall: These men were working on the boat continuously from the time that the boat got back from Mexico to the time this man was injured; I will show from his own records.

The Court: Proceed.

Q. By Mr. Fall: You hired Mr. Evanisevich to fish for the sardine season, didn't you?

A. Naturally, when he was on the boat, and I didn't sign nobody on; he just continued.

Q. He continued on and it was the intention that he was [21] hired for the sardine season, isn't that correct?

A. According to their statement, yes.

Q. According to what?

A. To their agreement they drew.

Q. You had an agreement with the fishermen, didn't you?

A. You can ask Mr. Evanisevich he made it himself.

The Court: Just answer the question.

A. Yes.

Mr. Gallagher: I think he is talking about the agreement between the union and the boat owners, is that right? A. That's right.

The Court: Proceed.

Q. By Mr. Fall: You were a member of the Boat Owners Association, were you not?

A. That's right.

Q. Your representative negotiated the agreement with the fishermen in the month of March, 1939?

(Testimony of Tom Mason.)

Mr. Gallagher: That is objected to, if your Honor please, upon the ground that the contract between the Union and the Boat Owners is not applicable in an action of this kind. Title 46, Section 531, the United States Code Annotated, states what kind of an agreement must be made with fishermen, and that agreement must be made in writing; it must be made with the master and must provide for a share of the fish caught.

Mr. Fall: If your Honor please, that section does not [22] limit the right of the boat owners to enter into a contract, and the main purpose, though, for the admission of this agreement, is to show there was a custom in the fishing industry that when a man is employed upon a boat he is employed for the whole season. I think Mr. Mason has so stated though, that the man was employed for the whole season.

The Court: He stated he was employed for the tuna season. A. That's right.

Q. By Mr. Fall: The tuna season; then for the sardine season, when he called him back, is that correct?

A. No, I did not tell him to come down; I told him to continue working. I did not say I hired him for the season.

Q. What did you call him down there for?

(Testimony of Tom Mason.)

A. I called him down there—usually every one of them told me, if there was anything to be done, or anything like that, to let them know.

Q. You were preparing your boat to go out for the sardine season? A. Yes.

Q. And you called Mr. Evanisevich down to work on the boat, didn't you?

A. Yes. He did not come, either.

Q. He came the next day, didn't he? He told you he couldn't be down there the first day?

A. That's right.

Q. He came down the next day? [23]

A. Yes, sir, about 10:00 o'clock in the morning.

Q. He worked all day, didn't he?

A. Not quite.

Q. He had worked ten days before that, hadn't he? A. No.

Q. Are you sure of that?

A. I am positive.

Q. Where were you on the morning of September 22nd, last year?

A. The 22nd, I was at home.

Q. You were at home? A. Absolutely.

Q. You don't know whether the boat was taken out though to try out the clutch that morning, do you? A. No, the boat was not out.

Q. You were not there, were you?

A. No, I was not.

Mr. Fall: I ask the answer be stricken, because it shows that he is not competent to testify to that.

(Testimony of Tom Mason.)

The Court: It may go out.

Q. By Mr. Fall: The rest of the men that you called down the morning of the 21st stayed on the whole sardine season, didn't they?

A. That's the same with them, as I did with him; the same thing.

Q. You called them down to work for the season, that's [24] correct, isn't it?

A. Yes, that's correct.

Q. And they worked for the season?

A. Some of them did.

Q. What ones did not?

A. Mr. Evanisevich did not.

Q. That was because he was injured?

A. Not that; because he refused.

Q. He refused? A. Yes.

Q. When did this happen?

A. After he got injured he promised me he will come; he did not want to, and he refused.

Q. Let us have that again.

The Court: Read the answer.

(Answer read by the reporter.)

Q. By Mr. Fall: After he was injured he did not come down to work on the boat?

A. No, when I called him we were leaving for San Francisco. He stated that he could not go with us, and he told me that he got injured on the boat, which I didn't know a thing about it.

Q. What date was that that you went to San Francisco? A. The 29th.

(Testimony of Tom Mason.)

Q. On the 29th? A. That's right. [25]

Q. When was the first time you had a conversation with Mr. Evanisevich after the 22nd of September, 1939, if you had any since that time?

A. Well, we had a conversation on the boat during work, and five days, from the 21st to the 26th, he was working four or five days on the boat, on a net; then the last day of the work he asked me if I would allow him to go on a vacation; that he had to go on account of his health, either to the Murrieta Springs; he has to go for a week, or if he doesn't go there he has to go to the Marine Hospital in San Francisco, whether I like it or not.

Q. This was the 26th you say?

A. Along about the 27th, something like that. I couldn't remember exact the date, but it's near there, a day before or after.

Q. You say he worked five days before that?

A. From the 22nd, when I called him down to come on the boat.

Q. He worked on the 22nd, 23rd, 24th, 25th and 26th? A. Yes.

Q. Whereabouts were you on the 23rd of September, last year? A. I was on the boat.

Q. You were on the boat?

A. On the 23rd, yes.

Q. You weren't on the boat on the 23rd, were you? [26]

The Court: What is the answer? A. Yes.

Q. By Mr. Fall: How about the 24th?

(Testimony of Tom Mason.)

A. Yes.

Q. The 24th you went in to Los Angeles, didn't you? A. Not me.

Q. One day between the 21st and the 24th you were in Los Angeles, weren't you? A. Not me.

Q. Were you on the boat every day between the 21st and the 27th? A. Yes.

Q. Pardon?

A. The 22nd and the 27th, yes.

Q. You were on the boat every day?

A. Yes.

Q. Maybe I misunderstood you before. I understood you to say you weren't on the boat on the 22nd. A. On the 22nd, yes.

Mr. Gallagher: I object to this upon the ground it is immaterial what counsel's understanding was. It doesn't seem to relate to any material issue.

Mr. Fall: Mr. Reporter, may we have you read the record with reference to the answer to my question?

(Record read by the reporter.)

A. The 22nd; that is right. [27]

Mr. Fall: I want his testimony earlier, as to whether or not he was on the boat on the 22nd.

The Court: I understood him to say he was not there on the 22nd.

Mr. Fall: There is no question about it .

The Witness: That's right.

The Court: You were not there on the 22nd?

(Testimony of Tom Mason.)

A. That's right. He got me mixed up. The 22nd, that's right; I started working on the 23rd.

Q. By Mr. Fall: What makes you say you were on the boat on the 23rd?

Mr. Gallagher: I object to that, if your Honor please, as immaterial.

The Court: Sustained.

Q. By Mr. Fall: Is there anything particularly that makes you recall the 23rd day of September of last year?

Mr. Gallagher: I don't want to keep objecting, your Honor, but I can't see what in the world this has to do with the issues raised by the pleadings here; that is, whether this man was injured in servicing the ship, or whether he is entitled to maintenance and cure and his doctor bills. Whether this man was on the boat on September 23rd can't possibly have anything to do with that.

The Witness: Absolutely not.

The Court: It doesn't appear to the court to be material, but sometimes, Mr. Gallagher, as you know, the court doesn't [28] know what the cross examiner has in mind.

Mr. Fall: I will state right now that the reason is this: Mr. Evanisevich did not work one day after he was injured, on the 22nd, and this man here now says that Mr. Evanisevich was there five days afterwards. I am trying to test the man's memory, which I am certainly entitled to, to determine how he

(Testimony of Tom Mason.)

remembers, or why he remembers, and if he really does remember.

Mr. Gallagher: The witness has testified that the libelant worked about five days just before they left for San Francisco, as I understood his testimony. Now, whether it was the 22nd or the 27th of September, may be a mistake made by the witness.

The Court: He has corrected it so far as the 22nd is concerned. Overruled. You may answer.

A. No, there wasn't anything particularly.

The Court: Read the answer.

(Record read by the reporter.)

Q. By Mr. Fall: What day of the week was the 23rd of September of last year?

A. My God, man, I don't remember. I can't keep all that in my memory.

Q. What date was the 24th—what day of the week?

A. I don't know. We are fishermen; not mind readers.

Q. What time did you go out to the boat on the 24th?

Mr. Gallagher: I object to that, if your Honor please, [29] upon the ground that it is a waste of the time of the court.

The Court: I think so. I am going to limit the cross examination on that point. Are you sure, Mr. Mason, that the libelant, Mr. Evanisevich, was there at work on the 23rd of September?

(Testimony of Tom Mason.)

A. It is in my mind that the evening we went to San Francisco he was.

Q. You don't have any independent recollection of it? A. No, I haven't.

Q. Just a minute. You stated a few minutes ago that he was there on the 22nd, the 23rd, 24th, 25th and 26th. Now, you have changed your testimony as to the 22nd. You weren't there; you don't know whether he was there or not?

A. Yes; I corrected it. I wasn't there.

Q. Were you there the 23rd? A. Yes, I was.

Q. Were you there the 24th?

A. That's right.

Q. The 25th and 26th? A. That's right.

Q. Was he there all of those days, or were you?

A. Yes.

Q. What is your answer? A. Yes.

Q. By Mr. Fall: Do you have any independent recollection of anything that happened during the time that recalls [30] to your mind at the present time that he was there?

A. He was working alongside of the rest of them, alongside of me; that's all I can say. I don't have any other particular recollection, except as I spoke just a while ago, that he asked me for a vacation, and he said he was going to go ahead, whether I liked it or not; he was going to take it.

Q. You said on one occasion he refused work? When was that that he refused work?

(Testimony of Tom Mason.)

A. He refused work when I called him to come back to work.

Q. What date was that?

A. That was way late in October, the 25th, when we got back from San Francisco.

Q. About a month or so later?

A. That's right.

Q. By Mr. Fall: Did you ever pay Mr. Evanisevich for his work that he did there in September?

A. I have offered to pay him for what he did; for the work he did on the boat, but he refused. I offered him $1.00 an hour, $12.00 a day, and he refused it.

Q. When was the next time you had a conversation with Mr. Evanisevich? After you left to go to San Francisco you say he told you he had to go on a vacation?

A. That's the day we put the net on the boat, about the 27th, that he wants to go on a vacation; on the 29th [31] we left for San Francisco.

Q. Did you have a conversation with him then on the 29th?

A. On the 28th, in the evening, I called him up to come down to the boat. He told me "I can't do it." He brought the clothes down there on the boat, and everything, and says for me to go ahead, and "I will be up there in a couple of days."

Mr. Fall: I ask that that be stricken, as being hearsay, what his brother told him.

A. No.

(Testimony of Tom Mason.)

The Court: Who told you?

A. He told me himself; Mr. Evanisevich.

Mr. Fall: I understood he said his brother.

The Court: He said the libelant.

Mr. Fall: I withdraw the request.

Q. Is that all the conversation you had on that occasion?

A. He explained to me how he got hurt.

Q. Yes.

A. And I begged him to come down to the boat. The next morning he came down to my back yard.

Q. What date was that?

A. The 29th. And he swung his arm forth and back, and says "My arm is getting fine. I will be up there in a couple of days." I told him if he could send his son up [32] too, and he says, "My son is working" and he says, "Well, you can put anybody in my place, if you can't get along without me." He says, "I will be up there in a few days. The doctor told me there was nothing wrong with my arm." So that's the end of it. He took his clothes down on the boat. That was the end of the conversation I had with him until I returned.

Q. When you returned, when was that?

A. The 25th of October.

Q. Did you have a conversation with him then?

A. I had.

Q. Where was that?

A. Right in my back yard.

(Testimony of Tom Mason.)

Q. Who else was present?

A. Four or five men; my father-in-law, mother-in-law; we were sitting on the back porch.

Q. What time of the day was it?

A. In the evening, around 5:30.

Q. What was the conversation?

A. He came there and asked me "How is everything?" I asked him "How is your arm getting along?" He said, "Fine. I will be up there", and he promised me he will be up there in a couple of days. He was swinging his arm, and he says, "I can do a lot of work. The only thing, I can't raise my arm clear straight up in the air, but the rest of it I can do it", and he chewed the rag there, and he went [33] off and left me. As soon as he got home he called me on the telephone again. I asked him what was the matter, and he demanded me for the share, and I told him that the crew and myself, when we made the figure, the day we made the figure, that we not give nobody a share, according to the boy that got hurt on the boat before. He got hurt, and he didn't get that share, and Mr. Marinkovich got hurt, and when Mr. Evanisevich was employed on the boat, and he didn't give it to Mr. Marinkovich either.

The Court: We won't take up time on immaterial matters.

Q. By Mr. Fall: Was that all of that conversation?

(Testimony of Tom Mason.)

A. That was all the conversation. I said he was ashamed to ask me for a share. I say the boys pay you for the groceries, and me and the boys, we are going to pay you for your work that you did on the boat; give you a dollar an hour. We put down $12.00 a day, and we are paying you for your board, when he was employed on the boat, which we did pay him for his board.

The Court: Is that part of the conversation.

A. That is right. And I made the check to him, and offered him $60.00 for the five days work. Mr. Evanisevich completely refused me. He said, "No, I am not accepting that for the simple reason I want a share." I says, "It is not my fault; the boys decided that way, that they are not going to give it to you, because you didn't give it to Mr. Marinkovich. [34]

Q. By Mr. Fall: That was all this conversation on the telephone? A. Absolutely.

Q. Is that all the conversation?

A. That's all we had for the present time.

Q. You have told us all the conversation you had on the 25th, in your back yard?

A. Yes.

Q. Did you have any conversation with him again after that? A. One month later again.

Q. When was that?

A. On November 24th.

Q. What day of the week was that?

(Testimony of Tom Mason.)

A. The 24th.

Q. What day of the week was that?

Mr. Gallagher: I object upon the ground that the calendar is the best evidence of that.

A. I don't know what it was.

The Court: He stated he doesn't know.

Mr. Fall: I want to see how his recollection is.

Q. Where did you have the conversation with Mr. Evanisevich?

A. It was usually the telephone. I won't show him no more in my house.

Mr. Fall: I ask that that be stricken, "I won't show [35] him any more in my house."

The Court: It may go out. Tell us what conversation took place on the telephone.

Q. By Mr. Fall: Will you tell us what the conversation was?

A. It's the same conversation that I spoke just a minute ago. He was demanding for the share.

Q. What did you tell him?

A. I told him I could do nothing for him, because the boys, they said they were not going to give him anything, because he didn't give nothing to the other members of the crew.

Q. Was that all the conversation?

A. He was talking something here and there; he needs money, and this and that. I didn't pay attention much to that.

Q. That was all the conversation then?

(Testimony of Tom Mason.)

A. Yes.

Q. When did you next have a conversation with him?

Mr. Gallagher: I submit, your Honor, that these conversations, are not of any probative value, and I submit it is wasting the time of the court.

Mr. Fall: Your Honor, I have something definite in mind with reference to these conversations, in view of some statements counsel has made.

The Court: You may proceed. Don't take any more time [36] than necessary.

Q. By Mr. Fall: I want to know all the conversations that took place after November 24th. What was the next conversation?

A. The next conversation, I don't think we have any conversation any more.

Q. You never had any conversation after that, did you?

A. I don't recall when we have any more.

Q. You didn't have any other conversations with him than you have told us about?

A. Yes, on November 24th he stated if I don't give him the share that he will sue me, and I told him that I knew that; that after the fourth day I arrived in San Francisco the people wrote to some of my members, that Mr. Evanisevich had no intention to go to work; that he was going to sue me for the season, and he was going to take it easy.

Q. Is that all the conversation you had with him on that occasion?

(Testimony of Tom Mason.)

A. Yes; that was the same day, the conversation.

Q. You have told us all of the conversations that you had with Mr. Evanisevich after the 22nd day of September of last year?

A. That's right.

Q. There isn't anything you haven't told us about those conversations?

A. No; that is all I can remember. [37]

Mr. Fall: That is all.

Cross Examination

Q. By Mr. Gallagher: (Showing witness document.)

Mr. Fall: I object to the witness being shown that at this time. It is certainly self-serving. He has testified that he had no other conversation, and undoubtedly this is an attempt now to contradict his own testimony.

The Court: If he stated he had no other conversations, would be a proper time, if it is a matter of refreshment of his memory, for his memory to be refreshed.

Mr. Gallagher: That is what I thought.

Q. Mr. *Evanisevich,* I hand you a paper, and ask you if you ever saw that before?

A. I did, and I made it myself.

Q. You made it out yourself?

A. That's right.

Q. What did you do with it when you made it out?

(Testimony of Tom Mason.)

A. I offered it to Mr. Evanisevich.

Mr. Fall: To which we object upon the ground that the proper foundation has not been laid for this conversation.

The Court: He asked him what he did with it.

A. I offered it to Mr. Evanisevich.

Q. By Mr. Gallagher: Where were you when you offered that paper to Mr. Evanisevich?

A. Right in my back yard. [38]

Q. What did Mr. Evanisevich say when you offered him that paper?

A. He say "I don't want it."

Mr. Gallagher: I offer it in evidence, if your Honor please.

Mr. Fall: What date was this?

A. September——

Mr. Fall: Just a minute. Please don't refresh your recollection at the present time.

Mr. Gallagher: I submit counsel has no right to tell the witness what to do and what not to do, if your Honor please. If he has any objection he should address himself to the court.

Mr. Fall: Your Honor, may this particular paper be withdrawn so the witness might testify from his own recollection before he looks at the paper as to what date this was?

The Court: We will proceed in an orderly way. If it is necessary to refresh his recollection, and it is a memorandum made by himself, he may do so.

Mr. Fall: May I have the witness on voir dire?

(Testimony of Tom Mason.)

Mr. Gallagher: I can ask him a few other questions.

Q. Mr. Mason, did you offer this paper to Mr. Evanisevich before you went to San Francisco on the sardine season, or afterwards?

A. Before. When I came back in my yard, and he told me the story he got hurt, I offered him, and he refused, and [39] say he got his private doctor; that he was directed to Dr. McCracken. I say it is foolish to spend the money which would get the medical free, and you could take this and go down to the Marine Hospital. If you can't go down I will take you down to the Marine doctor, and save you the money, but he says he don't want the bond; that he go to a private doctor.

Q. Do you recall the exact date when you left for San Francisco in the "Blue Sky" for the sardine season of 1939?

A. Yes, I recall now; it comes to my mind that it was the 29th we were going to leave, and I had had some business to attend to, and we left the next morning, the 30th.

Q. What time in the morning or night? What time did you leave for San Francisco on September 30, 1939, was it morning or night?

A. It was afternoon, around about 3:00 or 4:00 o'clock.

Q. How long after you offered this hospital certificate to the libelant here did you leave for San Francisco? A. The next day.

(Testimony of Tom Mason.)

Mr. Fall: To which we object. There is no evidence that it was offered to him before he left for San Francisco.

The Witness: Yes.

Mr. Gallagher: He so testified, your Honor.

A. Yes, sir, it was offered.

The Court: It is overruled. Read the question.

(Question read by the reporter.) [40]

A. I offered the same day that I was going to leave for San Francisco, but I postponed, and we left the next day. I made it the next day, and I told Mr. Evanisevich, when he rejected it, that I was going to leave it in my house, and any time he wants it he can come down and get it.

The Court: Was it the next day you went to San Francisco?

A. That's right.

Mr. Gallagher: I offer that in evidence, if your Honor please.

Mr. Fall: To which we object, your Honor, as being self-serving.

(Discussion.)

The Court: Overruled. Let it be received and marked Respondents' Exhibit A.

Mr. Fall: May we have an exception?

The Court: Yes.

Q. By Mr. Gallagher: I show you what purports to be a check dated September 24, 1939, drawn on the Bank of America, San Francisco. Sate

(Testimony of Tom Mason.)

whether or not that is the check that you gave or offered to Mr. Evanisevich for the five days work?

A. That's right.

Mr. Fall: To which we again object, your Honor. The testimony is that the offer was made by telephone, and again, at most, the check is merely self-serving.

Mr. Gallagher: He said he had a couple of conversations, [41] your Honor.

Mr. Fall: He limited the time to this conversation on the telephone.

Q. By Mr. Gallagher: Where were you when you offered this document, this piece of paper, to Mr. Evanisevich? A. I was right at home.

Q. Where was Mr. Evanisevich?

A. At home, and over the phone we have a conversation, and he flatly refused, and demanded full share.

Q. You did not offer it to him by hand then?

A. No, I have not.

Mr. Gallagher: I will withdraw the offer. That is all.

The Court: Do I understand, so far as this certificate is concerned, you actually handed it to him, or offered it to him, and your handing it to him he refused it?

A. Yes, he refused it, and said he had a private doctor. If you will permit me, your Honor——

The Court: No.

(Testimony of Tom Mason.)

A. O.K.

Mr. Gallagher: I have no other questions.

Redirect Examination

Q. By Mr. Fall: How much did each member of the crew of the "Blue Sky" earn during the sardine season that commenced in September of 1939?

Mr. Gallagher: That is objected to, if your Honor [42] please, upon the ground that it is immaterial. If the libelant would be entitled to anything at all, he would only be entitled to a share of that one trip or voyage, and not for every trip that was made during the season, not performing any work at all.

(Discussion.)

The Court: I think the court will overrule the objection.

Q. By Mr. Fall: How much did each man of the crew earn for his share for the sardine season, beginning September 1939? I guess it was about October 1st before you started to fish.

A. No, later than that.

The Court: I don't hear you.

A. Later than that. We started October 10th, on account of we had a strike up there for about 15 days.

Q. By Mr. Fall: What was that amount?

A. It was the amount—I have two figures here, one of which shows $1169.33. That includes with

(Testimony of Tom Mason.)

Mr. Evanisevich the first month he wasn't with us, and we divided ten shares instead of eleven.

Q. $1169.36?

A. That's on ten shares basis, and on eleven shares basis it is $1136.07.

Q. That is if Mr. Evanisevich had been with you?

Q. By the Court: That's on the basis of the division of eleven shares? [43]

A. That's right.

Q. The other figure was on the basis of ten shares? A. That's right.

Q. By Mr. Fall: The men actually got $1169.36?

A. That's right, $1169.33.

Q. How much did the men get for the first dark? A. $344.12.

The Court: Does that represent on the basis of a division of ten? A. Ten, that's right.

The Court: $344.12?

A. That's right.

Q. By Mr. Fall: Did you figure that as the division of eleven too? A. No, we didn't.

Q. On the basis of eleven?

A. I figured afterward what comes to eleven, is $312.83. That comes into eleven.

The Court: $312.83?

A. That's right.

Q. By Mr. Fall: How do you arrive at the difference there of $32.00 on one dark, whereas the difference on the whole season was only $36.00?

(Testimony of Tom Mason.)

A. I didn't get it.

Q. As I get your figures, the difference between ten and eleven share basis for the season was only $36.00, or [44] a little bit less than $36.00—$35.00 and some cents.

The Court: I think you had better not go into figures. Just find out what the amounts were. It would be a matter of computation. Let me ask you this question: For the total season was it $11,360.70? Do you have the total?

A. No, I haven't the total for the season. I just have——

The Court: $11,633.90, that's ten shares.

Q. By Mr. Fall: You are familiar with the terms of the contract that the boat owners entered into with the fishermen in 1939, are you not?

A. There are a few details I can say, which I got in our meeting, but I can't tell you all the details, that I am familiar with them.

Q. I will show you one paragraph here, paragraph 14. Are you familiar with this paragraph?

Mr. Gallagher: Just a minute. I object to that upon the ground that it is immaterial what is in the contract; unless it is in evidence you can't use it as the basis of a question, and get it in backward. There is no offer of the contract yet. If your Honor will look at it you will see that it is not made with the members of the crew; it is a contract made between the union, of which this libelant may or may not have been a member, and the boat owners, but

(Testimony of Tom Mason.)

that contract would not be competent proof of any fact in this case. It doesn't purport to be a contract of [45] employment. In any event, as I understand the rule, you cannot use a portion of a document as the basis of a question unless the document is in evidence.

The Court: I don't think there is any question about it.

Mr. Fall: I will withdraw the question, your Honor.

Q. Mr. Mason, were you a member, in 1939, of the Fishermen's Cooperative Association?

A. Yes.

Q. And did you authorize your representative, Mr. Marko Bodich, to enter into a working agreement with the United Fishermen's Union of the Pacific?

Mr. Gallagher: That is objected to upon the ground that it assumes that somebody named Marko Bodich is his representative. Furthermore, it calls for his conclusion and opinion. There are three claims here, and one man could not possibly underwrite the other two.

The Court: Sustained.

Q. By Mr. Fall: Who is Marko Cvitanich?

A. He is a partner and boat owner.

Q. He is a parter of yours and a boat owner?

A. Yes.

Q. Do you know whether he is a member of the Fishermen's Cooperative Association?

(Testimony of Tom Mason.)

A. No, he is not.

Q. How about Manuel Cvitanich, is he a member of the Fishermen's Cooperative? [46]

A. No, he is not.

Q. You were captain of the "Blue Sky" during 1939, as I understand you to testify?

A. Yes.

Q. You were the one in control of the boat?

A. Yes.

Q. You were the one that hired the crew?

A. Not all the time. Sometimes my partner, when he desires, he brings his friend down.

Q. So you take him on the boat?

A. Naturally, when he is satisfied, I would be too; we agree with each other.

Q. Do you know who Marko Bodich is?

A. All I know Marko Bodich, he is down at the Fisherman's Cooperative Association. I see him down once in a great while, when I go down to the meeting. Most of the time I don't go; very seldom do I go to the meetings.

Q. Did you enter into any negotiations, around the early part of March, of 1939, with the Fishermen's Union of the Pacific—United Fishermen's Union of the Pacific?

A. No, I didn't. We leave that up to our manager. He attends to all of that.

Q. Who is your manager?

A. John Ruzich.

Q. Where is he?

A. He is down in San Pedro. [47]

Q. How do you spell his last name?

(Testimony of Tom Mason.)

A. Ruzich, R-u-z-i-c-h.

Q. You have been a fisherman out of San Pedro, and on this coast, for how long?

A. About 15 years.

Q. Can you tell us whether or not it is the acknowledged custom in the fishing industry on the Pacific Coast, that when crew members are hired for fishing they are hired for the season, and may be discharged only for good cause shown?

A. He might be discharged without good cause.

The Court: Will you read the answer, please?

(Answer read by the reporter.)

Q. By Mr. Fall: Is that custom still in effect?

A. Absolutely. We had that before the union. It was established in 1934, I think, if I recall; I don't know.

Q. I show you a signature here on a document which purports to be a working agreement entered into by you, as captain of the "Blue Sky", and the United Fishermen's Union of the Pacific, and Fishermen's Cooperative Association. Is that your signature? A. Yes, it is. [48]

JOHN EVANISEVICH,

the libelant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Fall: State your name, please.

A. John Evanisevich.

Q. Mr. Evanisevich, when did you start working as a fisherman on the "Blue Sky"?

A. I started to work—they hire me around the 2nd of March.

Q. March of what year?

A. 1939, because they have to overhaul the engine——

The Court: Just answer the question: When did you start?

A. On the 2nd of March.

The Court: If you will pay attention to the question, Mr. Evanisevich, and just answer the question I think we will save considerable time.

Q. By Mr. Fall: When did the tuna season end?

A. The end of the tuna season?

Q. Yes.

A. It was the tuna season for that time I was with them, to the last part of August.

Q. Of 1939? A. Yes. [51]

Q. What did you do after that?

A. We was in Mexico, and by the end of the tuna, for ourselves, we was broke down in Mexican waters, and then we *can* to Pedro and had about

(Testimony of John Evanisevich.)

16 tons of fish. We stayed there a day, or something like that, and he wants to fix the clutch because he has the clutch broke down, and we came to Pedro on account of that.

Q. Did you work on the boat after you got back?

A. Yes.

Q. How long did you continue to work on the boat after you returned from Mexico?

A. We was overhauling the clutch.

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

A. Oh, around about part of September, until I got injured, almost every day.

Q. By Mr. Fall: Almost every day until you got hurt? A. Almost every day.

Q. Was there a period of ten days that you did not go down to work in the boat?

A. No, sir; a day or two, but not ten days.

Q. Was there an occasion that Mr. Mason called you to come down on the boat, on the 21st day of September, and you told him that you didn't want to come down?

A. The 21st day of September?

Q. Yes [52]

A. I can't tell you exactly the date, but by that time, they was to work before we started to fix the clutch; after we fixed the clutch, we was working on the clutch, and somebody attended the nets for the sardines, and after the nets were dry, we started;

(Testimony of John Evanisevich.)

and we did little things, one day or another day, until the clutch was all right; then after we fixed the clutch——

The Court: Wait a minute. Read the question, Mr. Dewing, and the answer.

(Record read by the reporter.)

The Court: I think you had better direct this witness' attention to particular matters.

Q. By Mr. Fall: Mr. Evanisevich, will you please pay attention to the question, so that you can answer just the question, and don't go into other matters other than just what I ask you. Did Mr. Mason call you to go down to work on the boat, on the 21st day of September, 1939?

A. I couldn't remember if he called me a certain date, but if he called me I always go to the boat, if it is necessary.

Q. Was there any occasion that he called you to go down to the boat that you did not go down to the boat?

A. No, sir, every time he called me I went.

Q. Had you worked on the boat several days before you were hurt?

A. We was hanging the nets before I got hurt, three or [53] four days.

Q. Did you work continuously three or four days, before you got hurt?

A. Continuous, steady, from 4:00 or 5:00 o'clock

(Testimony of John Evanisevich.)

in the morning until late at night. That was the kind of a job he wants to finish——

The Court: You have answered the question.

Q. By Mr. Fall: Was that during the hot weather we had last year?

A. Yes, close to the end of the hot weather. I can't tell you the date.

The Court: Was that just before you were hurt?

A. Before I got hurt.

Q. How many days before you got hurt?

A. We was working four days steady on the nets; with the fish net.

The Court: Very well; you worked steadily four days before you got hurt?

A. Before I got hurt.

Q. By Mr. Fall: On the 22nd of September, 1939, the occasion that you hurt your arm, will you tell us just what you were doing?

A. You want me to tell you the truth, and I am going to tell you. We was hanging the nets, and the day I got hurt, we went on the boat at 8:00 o'clock; then we went across the bay. That's the end of it.

[54]

Q. Please pay attention to the question. Mr. Reporter, will you read the question again?

(Question read by the reporter.)

Mr. Fall: When you hurt your arm?

A. The day when I hurt my arm we went to test the clutch in the morning——

(Testimony of John Evanisevich.)

Q. I will withdraw the question. How did you hurt your arm?

A. How did I hurt my arm? After we was through with the job, it was around noon time, we was going to go home, me and three or four guys there, and the brother of the skipper he went off the boat. I was going after him. Then I went after him, and I kept my foot on the step that goes up to the mast; then I put one foot on the wharf; then I lifted my foot from the step, and I slipped. Then I got hold with this arm, and hung my body on the arm.

Q. What did you have hold of with your left arm?

A. There goes up on the mast one step.

Q. There is a ladder from the side of the boat that goes up to the mast?

A. There are two cables from the deck up to the mast.

Q. Cross-bars?

A. Them pieces of wood for the step.

Q. Were you going to use those steps, before you went and put your foot on the step?

A. I was going to put my foot on the step, even with [55] the wharf, and when I put my foot on the wharf and lifted my left foot off the step, one foot slid off, and I got hold of it with arm right away, so as not to drop and kill myself on the boat.

Q. Did your body drop?

A. My body dropped, yes.

(Testimony of John Evanisevich.)

Q. What happened then?

A. After I dropped, I wasn't able to get on the wharf to protect myself. Then this hand was hanging on my body.

Q. The left one?

A. Yes. The guy was on deck, and I wasn't able to pull myself up on account of I hurt my arm, and the guy was there, and he lifted my left foot and put it on the step; then I got up again; so I was going off of the boat, and the skipper's brother got me and bring me to the wharf.

Q. You were going to lunch, did you say?

Mr. Gallagher: I object to that upon the ground it is leading and suggestive. He did not say anything about lunch.

Mr. Fall: I think that is what he testified. Where were you going?

A. I was going to go home from the boat, because we were through with that morning's work. It was so hot, I didn't want to walk up and down, on account of the weather was so hot. [56]

Q. Were you through for the day?

A. We finished everything we had to do before we leave

Q. Everything had been completed?

A. Everything was completely through.

Q. When did you first go to a doctor?

A. I can't tell you exactly the date, but I guess the doctor knows. It was Monday morning.

(Testimony of John Evanisevich.)

Q. If Monday morning was the 26th day of September, 1939, was that the date?

Mr. Gallagher: I submit, if your Honor please, this will be cumulative. I don't intend to put on any testimony to contradict Dr. McCracken's testimony with reference to when he started to treat him, or how long the treatment lasted.

Q. By Mr. Fall: The 26th was on Tuesday. I will withdraw it, as long as there won't be any question about it. Mr. Evanisevich, at any time after you were injured——

Mr. Gallagher: Just a minute. I didn't say there wouldn't be any question about Dr. McCracken's testimony. I still contend that Dr. McCracken's testimony is immaterial in view of the objections I made about the United States Public Health Service, and I do not want to have Mr. Fall's statement that there is no question about Dr. McCracken's testimony. The same questions remain. All I am saying is that I don't intend to contradict the doctor, with reference [57] to the commencement of the treatment, or the treatment which he gave him, or how long the treatment lasted, or the injuries that he found.

Q. By Mr. Fall: Did Mr. Mason offer you a certificate to go to the United States Public Health Service for treatment?

A. He don't offer me a certificate, but he tells me through the phone if I want to have a blank for going to the Marine Hospital, but I went to Dr. McCracken before, and I never thought——

(Testimony of John Evanisevich.)

The Court: Just answer the question. Read it, and the answer as far as he has gone, please, Mr. Dewing.

(Record read by the reporter.)

The Court: Go ahead.

Q. By Mr. Fall: When was this conversation you had with him on the telephone?

A. He called me up through the phone, that he was going to leave for San Francisco, and I told him——

The Court: When was it?

Mr. Fall: When?

A. I don't know exactly. I can't tell you the date.

Q. Was it before the boat went to San Francisco, after you had finished getting it ready, or had it been up to San Francisco?

The Court: Read the answer as far as he has gone.

(Record read by the reporter.) [58]

A. It was, I believe, before he went to Frisco. Of course, I couldn't remember the date exactly.

Q. By Mr. Fall: Did you ever have any conversation in his back yard, on the 30th day of September, the date the boat had left for San Francisco, wherein he offered you a certificate to go to the Marine Hospital of the United States Public Health Service?

A. No, sir; I never was in the yard before he went to Frisco.

(Testimony of John Evanisevich.)

Q. Did Mr. Mason ever offer you this?

The Court: You are referring to——

Mr. Fall: To Respondent's Exhibit A.

A. He never offered, but on the phone to me, after I told him through the phone——

Q. What did you tell him?

The Court: Did he personally hand that paper to you?

A. No, sir.

Q. Or present it to you in any way?

A. No, sir.

Q. Did you ever see the paper before?

A. No, sir.

Q. By Mr. Fall: How long have you been a fisherman on fishing boats in the United States?

A. For over thirty years.

Q. How old are you? A. Fifty-two. [59]

Q. You are fifty-two years old now?

A. Yes sir.

Q. When were you fifty-two?

A. In April, 18th.

Q. Have you ever seen that exhibit I have just shown you, Respondent's Exhibit A, before this present time?

A. You mean that blank you showed me here?

Q. Yes. A. No, sir.

Q. Did you ever have any conversation with Mr. Mason in his back yard, on the 30th day of September, 1939, the day that the boat left for San Francisco? A. No, sir.

(Testimony of John Evanisevich.)

Q. When was the first time you saw Mr. Mason after you hurt your arm; about how many days afterwards?

A. He went to Frisco, and I happened to come down by his place, and I went in there, and I told him all about my arm and he tried to tell me to come to Frisco. I told him if I could do it I would come; if I don't, I don't know.

Q. What was the condition of your arm about the time the boat left for San Francisco? Could you use it? A. No, sir.

Q. At any time did you have your arm in a sling? A. I had it for three months.

Q. When did you first have your arm in a sling?

A. Two days after I got hurt. [60]

Q. Was it in a sling when the boat left for San Francisco? A. Yes, sir.

Q. Did you work on the boat at any time after your injuries to your arm? A. No, sir.

Q. Did you have a conversation with Mr. Mason about two days before the boat had left for San Francisco, wherein he asked you to come down to the boat?

A. He told me they were going to leave; I don't know exactly the date. I told him I got hurt. He wasn't on the boat when I got hurt. I told his brother; his brother was there, and I thought they were going to tell him. I don't know.

Q. That is, his brother was on the boat when you got hurt? A. His brother, yes, sir.

(Testimony of John Evanisevich.)

Q. His brother or brother-in-law?

A. His brother Lamark was on the boat when I got hurt, and two other guys were present there.

Mr. Gallagher: I think he means the brother-in-law, your Honor. I don't want to have any uncertainty in the record. I did not know that Mr. Mason had a brother.

Mr. Fall: Was it his brother-in-law?

A. Brother and brother-in-law.

Q. Was the brother-in-law on the boat? [61]

A. The brother-in-law was on the boat, and his brother, Marko Cvitanich. That is what I heard; I don't know; they called one another brothers.

The Court: Anyway, both the brother and brother-in-law, or brother, were on the boat when you got hurt?

A. His wife's brother was on the boat when I got hurt, and another guy.

Q. By Mr. Fall: Did you ever ask Mr. Mason for a certificate to go to the United States Public Health Service? A. No, sir.

Q. You did have a doctor of your own?

A. I went to the doctor when I got hurt. I did not know right away how much I was hurt, until everything started being black and blue, and then I saw Tom Mason——

Mr. Gallagher: Whatever he told him, your Honor, would be hearsay.

Mr. Fall: Don't tell anything that you told any-

(Testimony of John Evanisevich.)

body other than Tom Mason, or just tell what you did, without telling what the conversation was.

Q. So after a period of time you went to a doctor of your own? A. Yes, sir; yes, sir.

Q. Did you tell Mr. Mason that you had gone to a doctor? A. I don't—— [62]

Mr. Gallagher: That is objected to on the ground that it is immaterial whether he did or did not.

The Court: Sustained.

Mr. Fall: I don't believe so, your Honor. Counsel brought that out in his examination of Mr. Mason, that this witness had told him that he had gone to a doctor.

Mr. Gallagher: I don't think that is correct, your Honor.

The Court: If that is correct as to the state of the record, I think it is a proper inquiry.

Mr. Fall: My recollection of the testimony was that Mr. Mason said that when he called him about this certificate, that he said that his uncle, or, rather, Mr. Bodich, said that Mr. Mason's uncle had sent him to a doctor.

Q. You say you did tell Mr. Mason, or you did not tell him, that you had gone to Dr. McCracken?

A. I can't remember anything about every day, what I was doing, but some I remember.

The Court: Do you remember whether you told him that? Just answer yes or no.

A. I don't.

The Court: You don't remember, is that it?

(Testimony of John Evanisevich.)

A. I don't remember.

Q. By Mr. Fall: Do you remember having a conversation with Mr. Mason on the telephone, about the day before or the day he left, wherein the subject of this certificate [63] to the hospital was talked about?

Mr. Gallagher: I will object to that, if your Honor please, on the ground that it has already been testified that he did. He went into that fully.

Mr. Fall: I asked about two questions; I didn't go into it fully.

The Court: Read the question, Mr. Dewing.

(Record read by the reporter.)

Q. By Mr. Fall: Not that certificate, but wherein Mr. Mason asked you if you wanted a paper to go to the hospital? A. Yes.

Q. At that time did you have any conversation with Mr. Mason regarding going to Dr. McCracken?

A. No.

Q. Did you ever refuse to go to the United States Public Health Service for treatment?

Mr. Gallagher: That is objected to upon the ground it calls for a conclusion, and it is a self-serving declaration. He has already testified that he was offered a hospital certificate and said he did not want it.

The Court: Sustained.

Q. By Mr. Fall: Did Mr. Mason ever request that you go to the United States Public Health Service?

(Testimony of John Evanisevich.)

Mr. Gallagher: That is objected to on the ground it calls for a conclusion of the witness, and not for the conversation. [64]

The Court: I think, in view of the importance of the matter, that you had better ask for the conversation. Ordinarily the court would not consider that objection good, because we would think that a man would understand the use of the word "request." That is a matter of common understanding, but this witness doesn't understand the English language very well, and it is a matter of importance in the case.

Mr. Gallagher: I would suggest that they use an interpreter, if there is any question as to his understanding of the language, because it is an important part of the case.

The Court: I think, in so far as ordinary language is concerned, he appears to understand it, but he may or may not understand the significance of "request."

Q. By Mr. Fall: Will you tell us all of the conversation, just what you said, and just what Mr. Mason said, when the subject of his saying something about going to the Public Health Service was talked about?

A. I never talked about that with him.

The Court: I don't think he understands just what your question is. You stated that Mr. Mason was talking to you over the telephone, and said something about a certificate so that you could go

(Testimony of John Evanisevich.)

to the Public Health Service. You stated that?

A. Yes. [65]

Q. That is what Mr. Fall asked you about. What did you say, and what did he say?

A. It was through the phone. I can't remember all of what was talked about.

Q. Just what you remember.

A. He was trying to tell me——

Q. Not what he tried to tell you. What did he say?

A. He wants to tell me to give me a blank to go to the hospital.

Q. What did you say?

A. I said to him, "I don't know." I was figuring it won't be necessary to go; like we usually go to Frisco, if there is anything like that to go, I thought maybe my arm won't be so long to bother me.

Q. Did you tell him that?

A. I told him everything about it.

Q. All we want is just what you told him and what he told you.

A. I can't remember everything we talked about.

Q. Whatever you remember; tell what he said, and what you said; because we don't expect you to remember everything; but tell us what did he say and what did you say.

Mr. Fall: Go ahead and answer the question. What did he say and what did you say?

A. He told me through the phone if I want to

(Testimony of John Evanisevich.)

have a blank to go to the hospital. I told him I don't think it [66] is necessary to go to the Marine Hospital, and I says here is the place to go to see what is wrong with my arm.

Q. As to the Marine Hospital, did he tell you where the Marine Hospital was, or what the Marine Hospital was?

A. That is mostly in San Francisco; most seamen go to the Marine Hospital.

Mr. Gallagher: I move to strike the answer as not responsive to the question.

The Court: Let it go out. Do you know where the Marine Hospital is?

A. I know there was one in San Francisco.

Q. Do you know whether there is one anywhere else?

A. They told me—I don't know when he tell me, so I go to the doctor here.

Q. Did Mr. Mason tell you anything about it?

A. When he talked over the telephone he didn't tell me to go any place; he only tells me if I need a blank to go to the hospital.

Q. By Mr. Fall: You didn't go to the hospital?

A. I didn't go to the hospital.

Q. Any hospital?

A. No, no, I just went to Dr. McCracken. That was all I went for.

Q. What is the condition of your arm at the present time?

Mr. Gallagher: That is objected to on the ground [67] it is immaterial, if the court please.

(Testimony of John Evanisevich.)

A. Not very good.

Mr. Gallagher: Dr. McCracken testified that whatever the condition is, it will continue to improve, and no further treatments have been given since July.

The Court: Overruled. You may answer.

Q. By Mr. Fall: What is the condition of your arm now? A. Not so good.

Q. What do you mean by not so good?

A. I can't raise it up.

Q. Stand up. Let us see how far you can raise your arm. Is that as far as you can get your left arm up?

A. That is as far as I can go with it.

Q. How about forward?

The Court: I think for the purpose of the record you had better state the movement.

Mr. Fall: In a horizontal—as he lifted his left arm horizontally it was approximately in a horizontal position, but it didn't go any higher.

The Court: His arm was even with his shoulder?

Mr. Fall: Just about even with his shoulder. His right arm continued up almost vertically. In a forward motion, lifting his arms in front of him, up above his head, I would say that he had just as much motion in the left arm as he had in the right arm.

Q. Bring your arm behind you. [68]

A. That is all I can go with it.

Mr. Fall: The left hand is just about over the

(Testimony of John Evanisevich.)

buttocks on the right side; just about even with the buttocks.

Q. How about the right arm? How far can you bring that up?

The Court: Take your left hand down, and put your right hand around there. Can you raise the other one any higher in the back, the left hand? Is that as high as you can raise it? That is as high as you can go? That is about to his waist in back.

Q. By Mr. Fall: How is your left hand? Do you have as much grip in that as you do in the right?

A. Always since I got hurt, every day I feel a little more grip in it.

Q. It is getting better?

A. It is getting better, yes.

Q. Have you almost as much grip in that as you have in the right hand?

Mr. Gallagher: That is objected to, specifically upon the ground that it is utterly immaterial what his condition is unless he is at the present time receiving medical attention, for this reason: The right to maintenance is co-extensive in time with the necessity to have medical care and attention. That is the reason I make the objection that his present condition is immaterial. This is not an action for damages for personal injury. [69]

(Discussion.)

The Court: Does that refer to medical care?

(Testimony of John Evanisevich.)

Mr. Fall: That is referring to medical care, yes.

The Court: The objection is sustained.

Q. By Mr. Fall: Were you able to return to work as a seaman before July 15th of this year—as a fisherman?

Mr. Gallagher: That is objected to upon the ground that it is calling for his conclusion, and a self-serving declaration.

The Court: Overruled.

A. This year?

Mr. Fall: Yes.

A. I am not able to return back to work yet, by my arm and by my feeling in this shoulder here.

The Court: Read the question and answer.

(Record read by the reporter.)

Mr. Gallagher: I don't think the answer is responsive to the question, your Honor. I move to strike it out.

The Court: It may go out.

Q. By Mr. Fall: Were you able to return to work as a fisherman before July 15th of this year? You can answer that yes or no. A. No.

Mr. Gallagher: I object upon the ground that it calls for his conclusion, and I would like to have the objection in before the answer. [70]

The Court: It is overruled.

Mr. Gallagher: Exception.

Q. By Mr. Fall: Have you received any money at all from Mr. Mason as maintenance?

(Testimony of John Evanisevich.)

A. Not a penny.

Q. Have you received any from him on account of your doctor bill? A. No, sir.

Q. Have you received anything from him on account of your share in the sardine season, or any part of the sardine season last year?

Mr. Gallagher: That is objected to upon the ground that it is assuming as a fact that he is entitled to a share. I will stipulate with counsel that he has not received five cents since the date of his injury from Mr. Mason for any purpose, for anything.

Mr. Fall: That he hasn't received anything since he finished the tuna season last year?

Mr. Gallagher: I don't know about the tuna season. I am just talking about the sardine season.

Q. By Mr. Fall: Did you receive any money from Mr. Mason after you finished the tuna season last year?

A. I don't receive any money from him except during the tuna season.

Q. Then you haven't received any money from him since the tuna season of last year? [71]

A. Not after the tuna season—since the tuna season. I received the money when I was down in Mexico two or three trips.

Mr. Fall: Maybe you don't understand. After you got through fishing tuna last year——

The Court: Doesn't Mr. Gallagher's statement cover everything here?

(Testimony of John Evanisevich.)

Mr. Fall: There is a period of time there.

The Court: I think his intention was to state that nothing had been paid by reason of these claims; is that correct, Mr. Gallagher?

Mr. Gallagher: Yes.

Mr. Fall: If that is the statement, we will accept the stipulation. That is all.

Cross Examination

Q. By Mr. Gallagher: Mr. Evanisevich, after you got back from Mexico, on the tuna season, what work did you do on the boat to finish up the tuna season?

A. After we was through with the tuna season—we was not through yet, but we had broke down the——

Q. Just a minute. After you got back to Los Angeles, to San Pedro Harbor, what work did you do as part of the tuna season, on the boat? Just tell us that, without telling us "After we got back" and all of that.

A. Unloading fish, and wash the boat. [72]

Q. Cleaning the nets?

A. We don't have to clean the nets.

Q. Did you clean the nets?

A. We don't have to clean the nets.

The Court: Answer yes or no; did you?

A. No.

Q. By Mr. Gallagher: When did you get back from Mexican waters in 1939?

(Testimony of John Evanisevich.)

A. You mean the last trip?

Q. In 1939, when did you return to San Pedro from Mexico?

Mr. Fall: Which time?

A. We went three or four times.

Mr. Gallagher : The last time.

A. The last time we was broke down.

Mr. Gallagher: I move to strike the answer upon the ground it is not responsive to the question. I asked him when. Do you understand me?

A. You asked me——

Mr. Gallagher: May we have an interpreter, your Honor?

The Court: I don't think it is necessary. Let me ask just a question or two: You went three or four times to Mexico last year? A. Yes.

Q. When did you get back from the last trip?

A. We got back around the last part of August. That [73] is my figure; maybe it is a little bit later, maybe sooner, but around that period.

Q. You said the last part of August?

A. The last part of August.

Q. By Mr. Gallagher: What was the first work you did on the boat preparing for the sardine season? A. The first work——

Q. Not "we."

A. I was helping them to take the clutch off the boat, to put it in a thing to fix it up.

The clutch was taken out of the boat?

A. Yes.

(Testimony of John Evanisevich.)

Q. And taken to a shop? A. Yes.

Q. How long was that before you were hurt?

A. That was around about twenty-five days.

Q. How many days did you work on the boat, taking out the clutch? A. We was working——

Q. Not "we"; you personally.

A. I was working a day or two days until the clutch—after we got the clutch——

Q. Let us get one thing at a time. After you got the clutch out, it was taken up to the shop?

A. It was taken up to the shop.

Q. Did you work on the clutch in the shop? [74]

A. I don't work on the clutch in the shop.

Q. After the clutch was taken out of the boat, did you work on the boat before the clutch was brought back?

A. We was doing a little bit of work; not too much.

Q. Did you personally work on the boat between the time the clutch was taken out and when the clutch was brought back to the boat? Yes or no.

A. Yes.

Q. How many days did you personally work on the boat while the clutch was out of the boat?

A. We was——

Q. How many days were you personally working on the boat between the time the clutch was taken out and the time it was put back in the boat?

A. I can't tell you exactly how many days.

Q. Approximately how many days?

(Testimony of John Evanisevich.)

A. Well, one day we was working, we was working for the clutch, to fix it; another day we was doing a little bit, and another day was the same. And there comes a time——

The Court: I think probably you will save time to have an interpreter.

(P. Radonich was here sworn as interpreter.)

The Court: You may tell him this, if there is a question that calls for a yes or no answer, he should answer it either yes or no; then he may explain the answer if he [75] desires. You tell him that. Very well. You may go ahead.

Q. By Mr. Gallagher: You returned from the last trip to Mexican waters about the end of August, 1929, is that correct?

A. I am not sure about it, but I am guessing.

Q. Do you know whether you got back from Mexico before September 5, 1939? Please answer yes or no. A. I am not sure about it.

Q. Your best recollection is that you got back about the last day of August, 1939, is that right? Answer yes or no. A. Yes.

Q. Then, about how long after you got back from Mexico, how many days was it you helped take the clutch out? A. A couple of days.

Q. Now, on the day of the accident, what work did you do on the boat, you personally?

A. (Without interpreter) I was myself—I was fixing what they call the scoop net.

Q. You personally fixed the scoop net?

(Testimony of John Evanisevich.)

A. (Without interpreter) Yes.

Q. That is a small net?

A. (Without interpreter) It is the scoop net, that is round.

The Court: We have the interpreter. You just answer in your own language. [76]

Q. By Mr. Gallagher: What time did you start to work on the scoop net?

A. We went about eight o'clock in the morning on the boat and we worked about ten or eleven in the morning.

Mr. Gallagher: I move to strike the answer I did not ask the witness what they did. I am asking him what he personally did, if your Honor please.

A. (Without interpreter) That is what I did myself.

Q. You personally?

A. Fixed the scoop net. (Without interpreter.)

Q. Just a minute. Let us get it throulgh the interpreter. You personally worked from eight o'clock till ten or eleven o'clock on the day of the accident, fixing a scoop net? Answer yes or no.

A. Not exactly from eight. We got on the boat at eight o'clock.

Q. You quit working on the fish net, on the scoop net, at 11 o'clock in the morning, did you not? Yes or no. A. Yes.

Q. Between eleven o'clock in the morning, and twelve o'clock noontime, on the date of your accident, what did you do? A. We had our lunch.

(Testimony of John Evanisevich.)

Mr. Gallagher: May I ask your Honor to have the interpreter tell the witness, through the interpreter, that when I ask him what he did, to please put his answer in [77] the first person, rather than "we," because I don't know whether the whole crew may have been doing something, or he alone, and I would like to get his personal actions exclusively.

Q. What time did you start to eat your lunch, on the date of the accident?

A. I can't tell exactly the time, the hour, but after we finished the work we went to lunch.

Q. Is it your best recollection that you personally started to eat your lunch about eleven o'clock in the morning on the day of the accident?

A. Not myself, but the whole crew.

Q. Were you included in the crew that started to eat lunch at eleven o'clock in the morning on the day of the accident?

A. I am not positive if it was eleven o'clock.

Q. Well, did you and the rest of the crew start to eat your lunch at approximately eleven o'clock in the morning of the day of the accident?

Mr. Gallagher: If your Honor please, it is apparent this witness is not answering any of these questions just yes or no. Your Honor instructed him to do that, and I ask your Honor again to instruct him to answer that question yes or no.

The Court: I think that is a proper request. Read the question. [78]

(Testimony of John Evanisevich.)

(Question read by the reporter.)

Mr. Gallagher: Tell him to answer that yes or no. A. Yes.

Q. When you got finished with your lunch, was it approximately twelve o'clock, on the day of the accident? Answer that yes or no. A. Yes.

Q. What time did you have your accident, approximately?

A. Around 1:30; close to two o'clock.

Q. What did you personally do between the time you finished your lunch and the time you had your accident?

A. As you know, it was very hot at that time and the other ones went away; some of them went away; I and some of our crew stayed in the boat, because it was hot. That is all. [79]

Q. By Mr. Gallagher: Mr. Evanisevich, did you, between the time you finished lunch, on the day of the accident, and the time of the accident, drink any beer at all on board the "Blue Sky"?

A. We had some drinks while we were eating.

Mr. Gallagher: I move to strike the answer out upon the ground that it is not responsive. Drinks might be coffee or tea or water. I asked him about beer.

The Court: It may go out.

Q. By Mr. Gallagher: Will you repeat the question to him? [83]

(Question repeated by the interpreter.)

A. Yes; we had beer, because it was hot.

(Testimony of John Evanisevich.)

Mr. Gallagher: I move to strike out everything except "Yes".

Mr. Fall: No; I think the rest should remain in there.

Mr. Gallagher: Upon the ground that it is not responsive to the question.

The Court: Denied.

Q. By Mr. Gallagher: How many cans of beer did you personally drink that day, before the accident, after 12 o'clock?

Mr. Fall: To which we object as being improper cross-examination, and not within the issues of this case.

The Court: Objection sustained.

Q. By Mr. Gallagher: What did you do between the time you started to eat lunch and the time you had your accident?

A. We stayed on the boat, because it was very hot, and I stayed myself.

Q. What else did you do besides staying on the boat, from the time you started to have your lunch and until the time you had your accident?

A. Nothing.

Q. Just before you had your accident did you have your right foot in the rigging? If the court please, may we have that answered yes or no?

A. (Without the interpreter): I was going up the steps, [84] to go off the boat. What am I going to answer you then?

The Court: That question calls for a yes or no

(Testimony of John Evanisevich.)

answer. You answer it yes or no, if you can, then explain your answer.

A. (Without the interpreter): Excuse me, your Honor, I want to answer everything, but I don't know exactly, because——

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

Mr. Gallagher: May I reframe it, your Honor?

The Court: Yes, you may.

Q. By Mr. Gallagher: Just before you fell did you have either foot anywhere on the rigging?

(Without interpreter):

A. I had one of my feet on the wharf, and one on the step, to go off the boat.

Q. Which foot did you have on the wharf?

A. The right one.

Q. Did you have the left foot on the rigging?

A. I had the left foot on the rigging.

Q. What did you have in your hand, if anything?

A. I had my hand here this way.

Q. Did you have a can of anything in either hand?

A. No, sir; I don't have no can on my hand.

Q. Isn't it true that just before you fell you were having an argument with the cook? [85]

A. You want me to tell the story?

Q. Yes or no.

A. I don't have no argument; only talked a little bit.

(Testimony of John Evanisevich.)

Q. You were talking about a political issue, were you not?

A. No, sir; just a couple of words, that was all.

Q. Weren't you and the cook talking about the ham and eggs proposition? Yes or no.

A. We were talking, yes.

Q. About the ham and egg proposition?

A. No, sir.

Q. When you were talking to the cook, didn't you have a can of beer in your hand?

A. No, sir.

Q. You were not drinking from a can of beer while you were up there with one foot on the rigging and one foot on the wharf?

A. No, sir; if you think I was drinking——

The Court: Answer the question.

A. No, sir; I don't have no beer in my hand then.

Q. By Mr. Gallagher: Did you have a can containing beer, in your hand, between the time you finished lunch and the time of your accident?

Mr. Fall: If the court please, to which we again object. I don't see that this is within the issues of this case; this line of questioning certainly is in the nature of a [86] special defense, that the accident occurred by reason of his own misconduct, and not within the issues of the case.

The Court: I think we will not proceed until the court determines whether the motion should be granted to amend.

(Testimony of John Evanisevich.)

Mr. Gallagher: I will state to your Honor that practically the only testimony that is going to be given by any of the witnesses produced by the respondent relates to that issue.

Mr. Fall: What is the ruling on the motion to amend?

The Court: Will you read the observation of the court, Mr. Dewing?

(Record read by the reporter.)

Q. By Mr. Gallagher: Mr. Evanisevich, where were you going at the time you were hurt?

A. I was on my way home when we stopped in town.

Q. As you were going home——

Mr. Fall: May I ask that the answer be stricken, that I was on my way home?

Mr. Gallagher: I have no objection.

The Court: That part may go out.

Q. By Mr. Gallagher: After your accident you went on home, did you? A. Yes.

Q. But you stopped in town on your way home, didn't you? A. Yes. [87]

Mr. Fall: To which we object as being improper cross-examination, not within the issues.

The Court: It has been answered.

Q. By Mr. Gallagher: Where did you stop?

A. Stopped at the Fishermen's Club.

Q. How long did you stay there?

Mr. Fall: To which we object as certainly immaterial as to what he did after he left the boat.

(Testimony of John Evanisevich.)

The Court: Sustained.

Q. By Mr. Gallagher: When did you go to Dr. McCracken?

A. Monday morning, after I got hurt.

Q. What day was the accident?

A. Figuring it my way, it was Thursday afternoon, but I don't know exactly the date. I guess that was it. I think it was Thursday, in the afternoon.

Q. How many times had you been to Dr. McCracken when Mr. Mason told you he would give you a hospital certificate if you wanted one?

A. I don't know.

Q. When Mr. Mason told you he would give you the hospital certificate to the United States Public Health Service, did you tell him you had gone to Dr. McCracken already?

A. Will you repeat that?

(Question read by the reporter.)

A. I think I did, but I am not positive. [88]

Q. Have you done any work for anybody since the day of the accident? A. No, sir.

Q. Didn't you take the place of your son on a fishing boat, between July 1st, last year, and this date? A. No, sir.

Q. Have you been on a fishing boat?

A. Yes, sir.

Q. Have you been on a fishing boat while it has been out to sea?

(Testimony of John Evanisevich.)

A. I have been four or five days on the boat, yes, sir.

Q. When was that?

A. That was around a period of—I don't know exactly; I don't remember.

Q. What month?

A. I guess it was May.

Q. What did you do on that fishing boat?

A. Nothing.

Q. What boat was it?

A. The boat "Hawk".

Q. Who is the master?

A. He is in Frisco now.

Q. I didn't ask you where he was. I asked you who he was. A. Andrew Xitko.

Q. How do you spell that? [89]

A. X-i-t-k-o.

Q. Was your son on that boat at the same time?

A. Yes, sir.

Q. You and your son were both at sea together five days? A. Yes, sir.

Q. And you swear positively that you did no work of any kind? A. No, sir. [90]

JACK FABULICH,

called as a witness on behalf of the Respondent, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Gallagher: Mr. Fabulich, what is your business? A. Fisherman.

Q. Are you presently engaged on the "Blue Sky"? A. Yes, sir.

Q. Mr. Fabulich, were you on board the vessel "Blue Sky" on the day when Mr. Evanisevich had an accident there? A. Yes, sir.

Q. Do you remember what was being done that day, on the boat?

A. I know I didn't do nothing.

Q. Were you there when Mr. Evanisevich came aboard? A. Yes, sir.

Q. Did Mr. Evanisevich do any work on board the boat that day? A. No.

Q. During the time that Mr. Evanisevich was on board the boat did you see him drinking anything besides water? [100] A. Yes, sir.

Q. What did you see him drink?

A. He drank beer.

Q. How many bottles or cans?

A. I can't tell exactly, but I know he drank a few.

Mr. Fall: Just a minute. To which I object——

Mr. Gallagher: Just approximately?

The Court: Mr. Dewing, will you read the last two or three questions and answers?

(Testimony of Jack Fabulich.)

(Record read by the reporter.)

Mr. Fall: To which we object—"I can't tell exactly"—everything after that is indefinite.

Mr. Gallagher: I don't mind it being stricken.

The Court: Do you ask that it go out?

Mr. Fall: Yes; the rest of the answer.

The Court: It may go out.

Q. By Mr. Gallagher: Mr. Fabulich, we don't want to know exactly how many, but approximately how many bottles or cans of beer did you see Mr. Evanisevich drink on the day of his accident, before his accident happened?

Mr. Fall: To which we object as being immaterial. That might have been ten hours before. I don't believe the question is material.

The Court: Objection overruled.

Q. By Mr. Gallagher: Do you remember the question?

A. Yes. He drank a few bottles; I can't tell you [101] exactly, but at least four or five beers, anyhow, as much as I could see.

Q. Do you remember how the boat was moored to the dock that day? Was it portside or starboard side to the dock? A. Port side.

Q. Did you see Mr. Evanisevich at the time of this accident? A. Yes, sir.

Q. What was he doing?

A. Well, he climbed to jump on the dock, so we climbed about two or three feet on the rigging.

(Testimony of Jack Fabulich.)

The Court: Will you read the answer, please?

(Answer read by the reporter.)

A. Then he put one foot on the dock and the other foot he still kept on the rigging.

Q. By Mr. Gallagher: Where was this rigging with reference to the length of the boat forward, amidships to aft? A. What do you mean?

Q. Where was the rigging located? Was it up at the bow, at the stern, or in the middle of the boat?

A. The rigging, it's on the middle of the boat, anyhow.

Q. When he climbed up there on the rigging he had one foot on the rigging, and one foot on the dock, and what did he do?

A. Then he stood there for two or three minutes. [102]

Q. Did he have anything in either hand during that time he was standing there?

Mr. Fall: To which we object as leading and suggestive.

Mr. Gallagher: I submit it is not leading.

The Court: Will you read the question, please?

(Question read by the reporter.)

The Court: I don't believe it is leading, Mr. Fall. Overruled.

A. Yes, sir; he had a can of beer.

Q. By Mr. Gallagher: Did he do anything with the can of beer except hold it in his hand?

(Testimony of Jack Fabulich.)

A. He was holding it in his hand, yes, sir.

Q. Was he talking to anybody?

A. He was talking to the cook. The cook was in the kitchen.

Q. Will you state what he was doing with both of his hands during the time he was standing there with one foot on the rigging and one foot on the dock?

A. He was just standing like that, holding the can of beer in his hand, and talking to the cook, you know.

Mr. Fall: Indicating his left hand.

A. He just stayed plain with that, holding with either hand—just plain; not holding anything by the rigging.

Mr. Gallagher: You mean he wasn't holding onto the rigging?

A. I mean he was plain, like this, holding the beer in [103] one hand and the other hand like that.

Mr. Fall: Also indicating the beer was in his left hand.

Mr. Gallagher: Are you right-handed or left-handed?

A. I guess he had the beer in the right hand.

Mr. Gallagher: I ask that that be stricken.

The Court: It may go out.

A. Yes; he had the beer in the right hand.

Q. By Mr. Gallagher: Was there any other way to get from the boat onto the deck?

(Testimony of Jack Fabulich.)

A. Yes; he could have gone on the bow.

Q. Where was the bow with reference to the level of the deck?

A. The bow was just about the level with the deck.

Q. Do you remember what Mr. Evanisevich and the cook were talking about? A. I remember.

Q. What?

A. They were talking about——

Mr. Fall: To which we object as incompetent, irrelevant and immaterial, what they were talking about.

Mr. Gallagher: I think it would go to show whether he was engaged in any duty he owed to the ship. He alleges in his libel that he was engaged in performing a command of the master at the time he fell.

The Court: Sustained. [104]

Mr. Gallagher: We take an exception, and offer to prove the following: That the entire subject of the conversation between libelant and the cook related to a particular issue commonly known as the Ham and Eggs Plan, which was then about to be submitted to the voters of the State of California, and that it has nothing to do with anything pertaining to the ship.

Q. Mr. Fabulich, how long had you known Mr. Evanisevich before the date of his accident?

A. Well, I know Mr. Evanisevich for the last few years.

(Testimony of Jack Fabulich.)

Q. Had you had occasion to see him quite often?

A. I used to see him quite often, yes, but I never had anything like friendship with him, or anything; just to say hello, hello to each other.

Q. How long had you worked with him on the same boat?

A. He was on the same boat for just the tuna season; that is, two or three or four months, I guess.

Q. During the time that you were on the same boat with him, did you live on board the vessel?

A. Yes. [105]

Q. Mr. Fabulich, how did you happen to go on board that day, the day of the accident?

A. Do you mean me?

Q. Yes.

A. Well, I still lived on the boat.

Q. You lived on the boat?

A. Yes; I sleep on the boat; I live on the boat; that's my house.

Q. Did Mr. Evanisevich live on board the vessel at that time? A. No.

Cross Examination

Q. By Mr. Fall: How much beer was on board the boat that morning Mr. Evanisevich was injured?

A. I believe we had two cases of beer that day on board.

Q. Early in the morning was that beer there?

(Testimony of Jack Fabulich.)

A. Early in the morning, yes.

Q. It was brought down that day, wasn't it?

[107]

A. The cook brought it down, yes.

Q. There wasn't any beer on board the boat before the cook brought the beer on, was there?

A. No.

Q. So that all that was on board was what the cook brought? A. Yes, sir.

Q. How many men were there on the boat that day?

A. Well, I believe eight was on the boat.

Q. As a matter of fact, there were eleven men on board the boat, weren't they—all of the crew? I will withdraw that. All of the crew was on board the boat, with the exception of the skipper, that is correct? A. Yes.

Q. And they all had lunch on board the boat?

A. Yes.

Q. In addition to the crew, Mr. Cvitanich was on board? A. Yes.

Q. So that made eleven on board the boat that day?

A. No; I told you eight men were on board. Three was missing.

Q. Who was missing?

A. The skipper and two others.

Q. Who were the other two that were missing?

A. Two.

(Testimony of Jack Fabulich.)

Q. What are their names? [108]

A. By golly, I can't give you the names.

The Court: Read the answer.

(Answer read by the reporter.)

Q. By Mr. Fall: Was Dino Bothidich on board?

A. Yes.

Q. Marko Marinkovich was on board?

A. Yes.

Q. Jack Vitolich was on board, wasn't he?

A. No; he was not on board.

Q. Where was Jack Vitolich, if you know?

Mr. Gallagher: I object to that upon the ground that it calls for his imagination. If he wasn't on board, he can't possibly say where he was.

Mr. Fall: He might have been around the dock there.

The Court: Did you see him there?

A. No.

Q. By Mr. Fall: How about John Certvich?

A. He was on board.

Mr. Gallagher: What time, counsel?

Mr. Fall: On that day.

Mr. Gallagher: I think it makes a difference if the witness is thinking about the time of the accident. Counsel is thinking about 7 or 8 o'clock in the morning.

The Court: Under the state of the evidence I think the objection should be overruled.

Q. By Mr. Fall: When you said Jack Vitolich

(Testimony of Jack Fabulich.)

was not there [109] you meant at the time the injury happened? A. No, sir.

Q. He was there before that, wasn't he?

A. No; that day he never showed up on the boat.

Q. He never showed up all day? A. No.

Q. John Vanich was there, is that correct?

Mr. Gallagher: I didn't hear any answer to the question.

Q. You said yes?

A. John Vanich, yes, he was on board.

Q. How many cans of beer did you have to drink that day? A. Well, I don't know.

Q. About how many?

A. Two or three beer.

Q. As a matter of fact, you might have had about four, didn't you? A. Put it at four.

Q. Four would be about what you had?

A. Yes.

Q. It was a hot day, wasn't it?

A. A hot day, yes.

Q. No one was drinking any wine that day, were they? A. No, sir.

Q. When did you have your first can of beer, kind of early in the morning? [110]

A. I never used to ever drink before I ate my meal.

Q. You did not have anything before you ate your meal? A. No.

(Testimony of Jack Fabulich.)

Q. But between the time you had your meal and the time that Mr. Evanisevich was injured you had about four beers? A. Yes.

Q. How many beers were left there in the galley after Mr. Evanisevich was injured?

A. I don't know. I can't tell you that.

Q. There were some cans left, weren't there?

A. Maybe, but I don't remember.

Q. Didn't you later on, in the afternoon, have another can of beer after Mr. Evanisevich had been injured?

A. I don't think there was left any beer after everybody went to the boat.

Q. You say you don't remember, is that correct, that you don't remember whether there was any beer?

A. There wasn't any beer any more after everybody left the boat, because it was all gone.

Q. You did have beer out of the galley, after Mr. Evanisevich was injured, didn't you?

A. No; I don't think there was any more beer on the boat when he left.

Q. You are not sure, though?

A. I am not sure, but—— [111]

Q. Whereabouts in the rigging did Mr. Evanisevich have his foot?

A. About three feet from the deck.

Q. What did he have it on?

A. On the rigging, you mean?

The Court: What part of the rigging?

(Testimony of Jack Fabulich.)

A. The port side.

Q. By Mr. Fall: Did he have it on a step?

A. He have a foot on the step, on the rigging, on the [113] step, yes.

Q. How far was it from the step that he had his foot on to the edge of the dock?

A. It could be about two feet, I believe.

Q. About two feet? You said he stayed there for about two or three minutes? A. Yes, sir.

Q. Just before he went up the ladder Mate Marinovich went up the rigging and stepped over to the dock, didn't he? A. Yes.

Q. He went up the same way Mr. Evanisevich went up? A. Yes. [114]

Q. What did Mr. Evanisevich have on the step in the rigging? A. The left foot.

Q. He had his left foot? A. Yes, sir.

Q. Will you tell us just exactly what happened after Mr. Evanisevich had been standing up there two or three minutes?

A. Then for some reason the boat started to move out to sea.

Q. The boat started to move. Then what happened?

A. Then his right foot slipped from the dock, and I was under him right on the *desk,* and he started to fall down, you see, and at the same time I grabbed him by his leg, around here.

Q. What happened to his arms?

(Testimony of Jack Fabulich.)

A. At the same time he grabbed himself with the left hand at the rigging.

Q. He grabbed the rigging with his left hand?

A. Yes.

Q. Then you put your foot over on one of the steps of the rigging, didn't you? A. Yes, sir.

Q. Then he climbed up and went on the boat, didn't he?

A. Then he climbed up again, and I jumped on the dock.

The Court: Will you read the last few questions and answers? [115]

(Record read by the reporter.)

Q. By Mr. Fall: As a matter of fact, Mr. Evanisevich fell, his legs dropped down, and they were lying alongside of the steps of the rigging, weren't they? A. Yes.

Q. When you said you grabbed his legs, you meant you pushed his legs over so that he could get his foot on the step of the rigging?

A. He turned back again to the rigging.

Q. He was hanging there with one arm, wasn't he? A. With one arm, yes.

Q. Whereabouts in the rigging did Mr. Evanisevich grab with his left hand?

A. Do you mean that there was anything on the rigging?

Q. What part of the rigging did he grab?

A. It is the port side of the boat.

(Testimony of Jack Fabulich.)

Q. Did he grab a step of the rigging, or did he grab an upright?

A. He grabbed the step of the rigging, yes, sir.

Q. What did he do with his right hand?

A. Nothing.

The Court: Is that step of the rigging wooden, or is it rope?

A. Wood.

Q. By Mr. Fall: What step of the rigging did he grab?

A. The third step or the fourth, something like that. [116] I can't tell you exactly.

Q. His body dropped down how far from where he was standing? Say he was about the height of the railing here, with relation to his shoulders, did he grab down below as he fell, or did he grab up above his shoulder?

A. He grabbed up above, you know. He was standing—just against his body, you see.

Q. You say the place in the rigging he grabbed was just opposite his body?

A. Maybe one step below his body.

Q. When you say his body, what do you refer to, the shoulders or the head?

The Court: Just stand up and show.

Q. By Mr. Fall: What do you refer to when you say one step below his body? What portion of his body?

A. Something like that, you see.

(Testimony of Jack Fabulich.)

The Court: About even with his left shoulder?

A. Yes.

Q. By Mr. Fall: It was one step below that he grabbed? A. Yes.

Q. How far apart are the steps?

A. About two feet; something like that, I guess. I don't know exactly.

Q. What did he do with his right hand when he fell? A. Nothing.

Q. You were standing under him? [117]

A. At the same time I grabbed him, so he did not have no other chance to use the other hand.

Q. Didn't some of the rotten wood or piling there come down as a result of his grabbing hold of the piling with his other hand?

A. No, sir.

Mr. Gallagher: I object to that upon the ground that it assumes there was rotten wood or piling.

The Court: He has answered; he said no.

A. No.

Q. By Mr. Fall: What happened to the can of beer? A. It fell out of his hand.

Q. It did not fall on the boat, did it?

A. No.

Q. You don't know what happened to it, do you?

A. No.

Q. As a matter of fact, he did not have a can of beer in his hand, did he?

A. Yes, he had a can of beer.

(Testimony of Jack Fabulich.)

Q. When did you see him first have that can of beer in his hand?

A. I took the can of beer in the kitchen, and he wanted to go home, and at the same time I stopped there, and he still was drinking that beer, and standing, as I told you before.

Q. He didn't fall off of this place up there before he [118] had this occasion when he slipped, did he?

A. He had still that can of beer in his hand.

Mr. Fall: I ask that the answer be stricken as not responsive.

The Court: It may go out.

Mr. Fall: I think the question isn't relevant. I will reframe the question.

Q. Did he fall at any time before the occasion you have referred to?

A. Not that I know.

Q. When did he have his first can of beer, that you saw him have?

A. Well, it was a hot day, so he was drinking. I never watched everybody, what they were doing on the boat.

Q. Was it early in the morning?

A. Well, maybe it was nine or ten o'clock; something like that.

Q. When was the next can that you saw him have—what time?

A. I don't know. I never watched, I told you before; I never watch everybody drinking. I saw that he was drinking quite a few beers.

(Testimony of Jack Fabulich.)

Q. I want to know when you saw him drinking any beer, that you have referred to, about nine or ten o'clock; that is, when was the next time?

A. After he was drinking, one after the other, every [119] time he get thirsty, he took the beer, and drank it up.

Q. Thirsty from what?

A. It was kind of a hot day.

Q. It was a hot day? A. Yes.

Q. Was he working out there in the sun?

A. No, he wasn't doing nothing.

Q. What were you doing?

A. I live on——

Q. What was he doing? I withdraw that question. What was he doing? A. Nothing.

Q. Where was he?

A. He was on the boat.

Q. Whereabouts on the boat?

A. Nobody, I tell you, I can tell.

Mr. Fall: I ask that that be stricken as not responsive.

The Court: It may go out.

Mr. Fall: Answer the question.

(Question read by the reporter.)

A. He wasn't doing anything on the boat.

Mr. Fall: I ask that that be stricken as not responsive.

Mr. Gallagher: That assumes that he was on one spot all day.

(Testimony of Jack Fabulich.)

The Court: Proceed. You may answer. Read the question.

(Question read by the reporter.) [120]

A. Well, walking around the boat, just doing nothing.

The Court: Read the answer, please.

(Answer read by the reporter.)

Q. By Mr. Fall: When did he start walking around the boat?

A. In the kitchen, he take a can of beer.

Q. When? A. And he came out—

Mr. Fall: I ask that the answer be stricken.

The Court: The answer may go out. Mr. Fall, the court is going to limit the cross examination on this point, very shortly.

Mr. Fall: I will withdraw the last question.

Q. The boat was taken out and run to test out the clutch that day, wasn't it?

A. Yes; the boat was in Fish Harbor, in the machine shop.

Q. It went over there, and then came back?

A. Yes, sir.

Q. When you left to go over to Fish Harbor the boat was headed in, wasn't it, at the wharf, with the bow toward the wharf?

A. I don't remember.

Mr. Gallagher: That is objected to on the ground it is immaterial, if your Honor please.

The Court: It would appear to be.

Mr. Fall: I will withdraw that. I think prob-

(Testimony of Jack Fabulich.)

ably that [121] will come out later on in some other matter.

Q. What did Mr. Evanisevich do when the boat went over to Fish Harbor, to the machine shop?

A. Nothing.

Q. Did you talk with Mr. Mason at any time that day?

A. I hadn't seen Mr. Mason that day.

Q. You didn't see him that day?

A. He wasn't on the boat that day.

Q. He came on later on that day, on the boat, didn't he?

A. I don't remember. I don't think he was on that day, on the boat.

Q. What did you do that day?

Mr. Gallagher: I object to that as immaterial, not cross examination.

The Court: It seems not to me.

Mr. Fall: In view of the previous testimony of Mr. Mason I will withdraw it.

Q. At the time Mr. Evanisevich was injured, all the work in preparing the boat had been completed, had it not? A. Yes.

The Court: What was the purpose of testing out the clutch? Was it going on a trip the next day, to San Francisco?

A. No; we had after so many days just waiting to go fishing, but everything was done on the boat; there was nothing to do any more on the boat. [122]

The Court: You said that you made a trip over

(Testimony of Jack Fabulich.)

some place for the purpose of testing the clutch.

A. Yes, but that was out just to try the engine; they ran the engine; that was their job. [123]

JERRY MARINKOVICH,

a witness called by and on behalf of the respondent, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Gallagher: (With interpreter) What is your business? A. Fisherman.

Q. Are you related to Mr. Mason? A. No.

Q. How long have you been a fisherman?

A. Thirty-eight months with him.

Q. Altogether, I mean. How long have you been a fisherman working on fishing boats?

A. About fourteen years.

Q. (Without interpreter) Were you the cook on the "Blue [125] Sky" at the time Mr. Evanisevich had his accident? A. Yes.

Mr. Gallagher: Maybe I can do all right. He seems to.

Q. Did Mr. Evanisevich do any work on board the boat the day of the accident? A. No.

Mr. Fall: To which we object as leading and suggestive—did he do any work?

Mr. Gallagher: I am trying my best to save time.

Mr. Fall: Ask what he did.

(Testimony of Jerry Marinkovich.)

The Court: It may be a little suggestive. It has been answered, however.

Q. By Mr. Gallagher: Mr. Marinkovich, do you remember when Mr. Evanisevich came on board the boat on the day of the accident; that is, what day he came on board?

A. (With interpreter) I believe about eight o'clock.

Q. What did he do from the time he came on board up to the time of his accident?

A. He was walking up and down on the boat, and talking. I don't know anything else.

Q. Did anybody repair a net on board the boat that day?

A. Yes; Matey Marinkovich made a new bladder.

Q. A new what—a scoop?

A. A new scoop.

Q. Did anybody else on the boat, excepting Matey Marinkovich, have anything to do with that scoop? [126]

A. Marinkovich and two helpers were working on it, and I was cooking.

Q. Who were the helpers on the scoop net?

A. Nobody; just a man; the two which were working down in the machine.

Q. That isn't what I asked you. Who was working on the scoop net?

Mr. Fall: Just a minute. May I interrupt, your Honor? I understand that the interpreter is

(Testimony of Jerry Marinkovich.)

not relating the questions to the witness as they are asked.

The Court: I think that is unfortunate, because we should have an interpreter who will repeat the questions exactly.

The Interpreter: These people mix the English language with their own, and the English version of their expressions are difficult; even the English word is not pronounced, so it is difficult for the interpreter to understand.

The Court: I understand that, particularly where they speak enough English so that ordinarily they get along, there is a tendency to use some English with their own language.

The Interpreter: Yes; even if the English were pronounced properly, a person would understand them better.

The Court: I think you had better be safe. We will try and take this without the interpreter.

(Without interpreter.)

Q. By Mr. Gallagher: Mr. Marinkovich, do you know Mr. [127] Evanisevich, sitting here?

A. Yes.

Q. Did Mr. Evanisevich work on the scoop net at all? A. No. That day?

Q. Not that day? A. No.

Q. Did you have anything to do with bringing beer on the vessel?

A. I bring beer for the gang.

Q. You brought beer for the gang?

(Testimony of Jerry Marinkovich.)

A. Yes.

Q. How much beer did you bring on board, on the day of the accident?

A. I think I bring two cases.

Q. Was there any beer on board before you brought the two cases? A. No.

Q. Did Mr. Evanisevich drink any beer before lunch time? A. Before lunch?

Q. Yes. A. Yes.

The Court: Did you say that was before lunch? Did he drink before lunch, or not?

A. Before lunch.

Q. By Mr. Gallagher: Did you have any conversation with Mr. Evanisevich about this drinking beer, before lunch? [128] A. No.

Q. No talk?

A. Yes, we talked, you see——

Q. What did you talk to him about beer before lunch?

A. I say not to drink too much beer, because we no got plenty for all day, because three engineers were on the engine.

Q. There were three engineers working on the engine? A. Yes.

Q. One man working on the scoop net?

A. Yes, he work about two hours.

Q. He worked about two hours? A. Yes.

Q. Was it all finished then? A. No.

Q. When was the scoop net finished? Who finished the scoop net?

(Testimony of Jerry Marinkovich.)

A. We finished after while, when we went to San Francisco.

Q. When did Mr. Evanisevich start to drink beer that day? A. Oh, about ten o'clock.

Q. Was it bottle beer or can beer?

A. Can beer.

Q. What kind of beer?

A. I am not sure.

Q. How many cans of beer did you see Mr. Evanisevich take that day, before the accident?

[129]

A. Oh, about six or seven.

Q. Did you see the accident? Did you see him fall?

A. No; just was hanging with his hands.

Q. Did you see him before he fell?

A. Yes.

Q. Where was he just before he fell?

A. On the step.

Q. From the step to the deck?

A. No, the railing—what you call on the boat, the mast——

Q. The rigging? A. Yes.

Q. What was he doing in the rigging?

A. He was talking to me. [130]

Q. Tell the court how Mr. Evanisevich was standing. Where did he have both feet, just before the accident?

A. One foot on the step where is going for the mast.

(Testimony of Jerry Marinkovich.)

Q. Up on the mast?

A. Yes. And another, he has in this hand got the beer.

Q. In his right hand? A. That's right.

The Court: The right hand?

A. Yes, and the face he got to the stern.

Q. By Mr. Gallagher: He faced which way?

A. In the stern, in back.

Q. He was facing the stern of the boat?

A. Yes. [132]

Cross Examination

Q. Where did he have his right foot, before he fell?

A. This foot he got on the wharf, and this he got in the railing.

The Court: That foot was in the rigging?

A. In the rigging, yes.

Q. By Mr. Fall: You have talked this matter over with the other men out in the hall, that have been called as witnesses, who came down from San Francisco, haven't you?

A. I can't understanding anything.

Q. We will take it apart. You came down from San Francisco with other members of the "Blue Sky", didn't you? A. Yes.

Q. You are still on the "Blue Sky"?

A. No.

Q. Did you come down with Jack Fabulich?

A. Yes. [134]

(Testimony of Jerry Marinkovich.)

Q. He is on the "Blue Sky"? A. Yes.

Q. You came down with somebody who was on the "Blue Sky"? A. Yes.

Q. How did you come down; on the train, bus, or what? A. Train.

Q. Did you talk about this case?

A. No, nothing.

Q. You haven't talked with anyone about this case? A. No.

Q. You never talked with Mr. Gallagher here about this case, this man here?

A. That man, he no be on the train.

Q. Did you ever talk with him?

The Court: Just a moment. There must not be any outward reaction to the testimony of any of these witnesses by any of those in the courtroom. If anyone disturbs the proceedings they will have to leave the courtroom.

Q. By Mr. Fall: Have you ever talked with Mr. Gallagher here about what you were going to testify to today? A. No.

Q. Did you ever talk with Mr. Roberts, sitting next to him, about what you were going to testify to today? A. No.

Q. Did you ever talk with Tom Mason about what you were going to testify to today? [135]

A. A few days he say to me, got to be in court; that is all he talk; we got to be in court on the 23rd.

(Testimony of Jerry Marinkovich.)

Q. Did some one serve a subpoena on you, to be here?

Mr. Gallagher: The best evidence of that would be the marshal's return.

The Court: I don't think it is material.

Mr. Fall: I am trying to find out what he has done with reference to talking to people.

The Court: He says he hasn't talked with either of the attorneys, or Mr. Mason, except that Mr. Mason told him to come here for the case.

Q. By Mr. Fall: Have you talked with anyone about this accident since the day it happened, until you talked to Mr. Mason just a few days ago?

A. Just a few days ago; we got a meeting in San Pedro, and he say to me, we have court on the 23rd.

Mr. Gallagher: What is that?

Mr. Fall: "We have court on the 23rd", I assume he means.

The Court: I guess that is what he means.

Mr. Fall: The 23rd of October.

Q. How many members of the crew of the "Blue Sky" were on board the boat on the 22nd of September of last year?

A. I don't know how many.

Q. Were all the crew there on board?

A. When Mr. Evanisevich fell down?

Q. Yes; not right at that time; sometime during the day. [136] A. Eight men eat dinner.

Q. Eight men ate dinner? A. Yes, eat.

(Testimony of Jerry Marinkovich.)

Q. Did some men go before dinner—leave before dinner? A. No.

Q. Where did you get the beer that you brought on board that day? A. In the grocery.

Q. What grocery?

A. The New Deal Market.

Q. Whereabouts is that New Deal Market located?

A. Center Street—16th and Center.

Q. Did you pay for the beer that morning?

The Court: It seems to the court you are going too far.

Mr. Fall: I am asking this to determine whether or not there will be a record of those particular purchases, because I am going to produce that record in this court. That is the only purpose of this, to determine whether or not there would be a record.

The Court: You may ask a very few questions on that matter.

Q. By Mr. Fall: Did you charge the beer, or did you pay for it?

A. We take the beer; when we make the money we pay it.

Q. You didn't pay for the beer that morning?

A. No. [137]

Q. You bought it then that morning, the 22nd of September? A. Yes.

Q. How many cans were left in the galley after Mr. Evanisevich was injured?

A. I don't know.

(Testimony of Jerry Marinkovich.)

Q. You still had some beer there for the engineers, didn't you? A. Yes.

Q. There was still some beer left after Mr. Evanisevich was injured?

A. After I finish washing the dishes I went home, and the engineers, they worked on.

Q. What time did you go home?

A. About three o'clock in the afternoon.

Q. But there was still some beer left there when you left to go home? A. Yes.

Q. About how many cans?

A. I don't know.

Q. There was always a case of beer, wasn't there?

A. I don't know; in the ice box, I don't know how many beer.

Q. How many beers did Mr. Evanisevich have before lunch? A. I don't know.

Q. How many did he have during lunch? [138]

A. Altogether I count about——

Q. Just a moment. I ask that that be stricken as not responsive. I want to know how many he had during lunch.

A. I am not sure. I just count how many he drank that day.

Q. How much did he have after lunch?

A. Altogether, about six or seven.

Q. After lunch? A. No, altogether.

Mr. Fall: I ask that the answer be stricken as not responsive.

(Testimony of Jerry Marinkovich.)

The Court: It may go out.

A. I am not sure.

Q. By Mr. Fall: What time did you have lunch?

A. About eleven o'clock.

Q. What time did you finish lunch?

A. Lunch, we eat about half an hour.

Q. You have no recollection of how many he had before lunch, during lunch, or after lunch?

A. No.

Q. How do you arrive at six or seven? How did you arrive at that?

A. Because I count.

Q. You counted it? A. Yes.

Q. Where was he when he had the first can of beer that you saw? [139] A. In the kitchen.

Q. In the kitchen? A. Yes.

Q. Did you mark it down in there every time he had a can of beer? A. No. I remember it.

Q. You remembered it? A. Yes.

Q. Did not Mr. Mason tell you to say that he had six or seven cans of beer?

A. He don't say nobody nothing.

Q. How many cans of beer did you drink that day? A. Maybe one.

Q. How many more than one?

A. One, because I no like beer. We use wine on the boat. I like better to drink a little wine.

Q. How many cans of beer did Jack Fabulich have? A. I don't know.

(Testimony of Jerry Marinkovich.)

Q. How many cans of beer did Marko Bodich have? A. I don't know.

Q. How many cans did Marko Marinkovich have? A. I don't know.

Q. How many cans did Jerry Marinkovich have? A. I don't know.

Q. How many cans did John Slovich have?

A. I don't know. [140]

Q. How many cans did John Brankovich have?

A. I don't know.

Q. You don't know how many cans of beer anyone else had that day, but Mr. Evanisevich, do you?

A. Yes, because I know he like to drink, and somebody like to drink water, and Mr. Evanisevich no like to drink water.

Q. How many cans of beer did the engineers have? A. I don't know.

Q. After Mr. Evanisevich fell, just tell what he did. I understand one foot slipped off the dock, did it?

A. I don't see him when he fell down.

Mr. Gallagher: That is objected to as not cross examination.

Q. By Mr. Fall: You did not see him?

A. No; I just see him hanging with his hand, and Mr. Fabulich catch the foot.

Q. He put his foot over so that he could put it on one of the steps of the rigging?

A. Between the boat and the wharf.

Q. Fabulich put his foot over so that he could

(Testimony of Jerry Marinkovich.)

put it on one of the steps of the rigging, so that he could get up, didn't he?

Mr. Gallagher: I object to that upon the ground it is not cross examination.

The Court: Yes, I think so. Objection sustained.

[141]

Q. By Mr. Fall: How long did he hang there with his one hand?

Mr. Gallagher: Same objection, if your Honor please; not cross examination. I did not go into that.

Mr. Fall: He said he fell, and was hanging there with one hand.

The Court: He may answer the question.

Q. By Mr. Fall: How long did he hold there by one hand?

A. Until Fabulich he catch him, and he went in the boat.

Q. Did he hang there about a minute?

The Court: No, he just stated——

A. I no see when he fell down.

Q. By Mr. Fall: You just saw him hanging there?

The Court: He stated just long enough for Mr. Fabulich to get him in position.

Q. By Mr. Fall: You don't know how long he had been hanging there before you saw Mr. Fabulich bring his legs up? A. No.

Q. How did it happen that you came down on

(Testimony of Jerry Marinkovich.)

board the boat that day? How did it happen that you came on board the "Blue Sky" that day?

A. Because I am cook; cooking.

Q. Did some one tell you to come down there on board? A. Yes, the captain.

The Court: Who did? [142]

A. The captain.

Q. By Mr. Fall: Was that Captain Tom Mason?

A. Yes.

Q. When did he tell you that?

A. The day before.

Q. Was anyone else present? A. No.

Q. Weren't the rest of the crew members there, and the captain "All be down tomorrow"?

A. No; just say three men, and I am four.

Q. Was Mr. Evanisevich on board the boat the day before he was injured?

A. I no remember.

Mr. Fall: That is all.

Redirect Examination

Q. Mr. Gallagher: Who were the other men with you when the captain told you to come on board the day of the accident?

A. I no catch you.

Q. You say Captain Mason told you to come on board the day of the accident?

A. No, no—yes; that day.

Q. He told you to come?

(Testimony of Jerry Marinkovich.)

A. The day before.

Q. He told you the day before to go on board the day of [143] the accident? A. Yes.

Q. Where was that? Where did he tell you that?

A. He told me through the telephone.

Q. Were you over on one of the boats?

A. No, I be home.

The Court: He called you up and talked to you over the phone? A. In the phone, yes. [144]

Los Angeles, California,

Friday, October 25, 1940, 10 A. M.

Mr. Fall: If your Honor please, I have here the book from the New Deal Cash Market in San Pedro, the market from which, I believe, most of the groceries and things for the "Blue Sky" were purchased. Mr. Gallagher and I can stipulate as to some dates and purchases here, to facilitate the matter, rather than call witnesses.

This book shows that on the 30th day of August, 1939, a statement was given to Mr. Mason. They undoubtedly had returned from Mexico at that time. The bill was paid. The statement that had been given to Mr. Mason on the 30th day of August was paid on the 5th day of September; that there were purchases of groceries for the "Blue Sky"

on September 2, 6, 8, 11, 12, 13, 14, 15, 16, and 18. There is noted at the bottom that that was Monday. Apparently the 17th was Sunday; the 19th, the 20th, and the 22nd. The next one after the 22nd was the 28th, and that on the 22nd of September the following items were purchased: Two cases of beer; 18 lamb steak chops; 18 lamb chops; 5 French —I assume that means French bread; 2 lettuce; 4 pounds of tomatoes; 3 radishes, lg.;—I imagine it means large—one lemon pie; one apple pie; one pineapple pie; 10 pounds of grapes, black and Muscat; one and one-quarter B ham——

Mr. Gallagher: Boiled ham.

Mr. Fall: Boiled ham; one and one-quarter pounds M ham. [145] I don't know whether that means minced ham. One quart of milk.

On all of the days after the 13th of September there were—I might say on the 13th of September there was one case of beer in the order; the 14th of September, two cases of beer; the 15th of September, two cases of beer; 16th of September, one case of beer; 18th of September, three cases of beer; 19th, two cases of beer; 20th, two cases of beer; and on the 22nd, two cases of beer. It indicates on most of them that they were Schlitz beer.

I will call Mr. Evanisevich. [146]

JOHN EVANISEVICH,

the libelant, recalled as a witness in his own behalf, having been previously sworn, testified further as follows:

Direct Examination

Q. By Mr. Fall: Mr. Evanisevich, did you have a conversation with Mr. Mason to the effect that you wanted to go away on a vacation?

A. I asked him——

Q. You can answer that yes or no.

A. Yes.

Q. Where was that conversation? Where did it take place?

A. That was the last date when we was working on the nets.

Q. Was it the last day you were working on the nets?

A. The last couple of days, before I got hurt.

Q. Where did the conversation take place?

A. I was asking him, after we were through——

Q. Was it on the boat?

A. On the boat, yes.

Q. Was anyone else present at that time? [147]

A. In front of him, I don't know if anybody knows or not.

Q. What was the conversation? What did you say, and what did he say?

Mr. Gallagher: That is objected to upon the ground that it is immaterial, and not responsive to any issue raised by the pleadings.

(Testimony of John Evanisevich.)

Mr. Fall: Mr. Mason indicated in the examination that this man said he wanted to go off on a vacation, indicating that was the reason why he wasn't back at work.

Q. What did you say, and what did he say?

A. I said I was going to ask him, because he was figuring——

The Court: No, just what was said. You listen to the question.

Q. By Mr. Fall: What did you say, and what did he say?

A. I asked him I like to go up to Murietta springs for a few days, if we don't go fishing, after we get through with the work. Then he says, "I got a chance to go?" Then the last day, when we put the nets on board, it was hot weather down at Pedro, in the evening, and he said to the boys——

Q. This was another conversation? A. Yes.

Q. What day was this?

A. This was the 21st.

Q. What was that conversation?

A. "I would like to go up to Murietta Springs for a week."

Q. Yes. [148]

A. Then he says, "You can go." Then, at the time, it was the last day going on the nets, and he said to all the boys——

The Court: What day was that?

A. That was the 21st.

(Testimony of John Evanisevich.)

Q. After he told you you could go, you had another conversation? A. The 21st of the month.

The Court: You better straighten that out.

Mr. Fall: Just a minute. Let us cover one thing at a time.

Q. After he told you you could go to Murietta Springs, you had another conversation, or was this all part of the same conversation?

A. That was all a part, except it was so hot—I am going to tell you all about it—it was hot there, I was figuring when it was so hot down there——

[149]

Q. By Mr. Fall: This is the conversation you had on the 21st, not the next morning.

A. Not the next morning?

Q. I want to clear that up. Finish what that conversation was. Did he tell all of the men?

A. He says to the boys——

Q. And who were the boys?

A. All the crew, go in the morning, eight o'clock in the boat; that some holes in the nets, to fix it. Then the clutch, to test it, and everything to get ready. Then when he says that, I went in the morning at eight o'clock on the boat, with the rest of the crew.

Q. Did the boat go to Terminal Island that day?

A. Yes, sir.

Q. After the boat returned, do you know what time it was? Do you know what time it was when the boat returned to San Pedro?

(Testimony of John Evanisevich.)

A. I don't know exactly the time, but it was around between ten and eleven o'clock.

Q. So it was after you returned to San Pedro that you had something to eat? A. Yes.

Q. You said you stayed on the boat for a while after you had something to eat?

A. Yes. [150]

Q. Where did you say on the boat after you had something to eat?

Mr. Gallagher: I object to that upon the ground that it calls for his conclusion and opinion, and is a self-serving declaration, and furthermore, upon the ground that it has been asked and answered. He testified on his original direct examination fully with reference to his reasons for staying on the boat for approximately two hours after lunch.

Mr. Fall: I submit there was no such question, and no such answer.

The Court: Read the question.

(Record read by the reporter.)

The Court: Overruled.

Mr. Gallagher: Note an exception.

Q. By Mr. Fall: Why did you stay on the "Blue Sky" after——

Mr. Gallagher: I think counsel ought to stick by the question, so as to keep the record straight; otherwise there will have to be an objection to every new question.

Mr. Fall: Let it be stricken.

(Testimony of John Evanisevich.)

A. I stayed on the boat; there was nothing doing. I expected the skipper was going to come down and see if everything was all right.

Mr. Gallagher: I move to strike out this part of the answer, particularly "and I expected the skipper was going to come down to see if everything was all right," upon the ground that it is not competent proof of any fact, and states [151] his conclusions and opinions, and is an expression of his ideas, if he ever had any such.

The Court: Overruled.

Mr. Gallagher: Note an exception.

Q. By Mr. Fall: The skipper did not come down?

A. No, all the time I was on the boat.

Q. Then the men, some of the other men, started to leave, did they, before you did?

A. Some of them went after they ate their lunch; then there was me and four more fellows; the skipper's brother, the skipper's brother-in-law, and another fellow, Jack—what's his name?

Q. Fabulich? A. Fabulich.

Q. He lives on the boat?

A. He lives on the boat. Then the four was with me; then the skipper's brother went off to some place, and I started to go, go over on the wharf.

Q. When he started to leave was the time you left too?

(Testimony of John Evanisevich.)

A. Yes. I went on the wharf at the same time. I was after him at the same place; I was going off. After his brother got on the wharf, then I stepped on the rigging steps to go off on the wharf, the same as his brother.

Mr. Fall: No further questions on direct examination. [152]

Cross Examination

Q. By Mr. Gallagher: Mr. Evanisevich, name all of the men who were on the "Blue Sky" on the morning of September 22, 1939, when you first went on board.

A. That is the day when I got hurt, you mean?

Q. Yes. A. Myself.

Mr. Fall: At eight o'clock he is referring to, when you first went on the boat.

A. I don't know exactly every one that got on the boat at eight o'clock, but we was on the boat, me and the rest of the crew.

Q. By Mr. Gallagher: Name them; that is what I want you to do.

A. All right. The first one I am going to tell you is John Zorotoivich.

Q. How do you spell it?

A. I can write it down for you.

Q. Zorotoivich? A. Yes.

Q. That is close enough. A. Yes.

Q. Who was the next one?

A. The next one is what they call, Big Guy Dinco Botovich.

(Testimony of John Evanisevich.)

Q. Dincobotovich?

A. That is just the way I can explain it, the names. [153]

The Court: That is close enough.

A. Then Marko, the owner of part of the boat, —Cvitanich.

The Court: How do you spell that, Mr. Gallagher?

Mr. Gallagher: (Spelling) C-v-i-t-a-n-i-c-h, I think. That is close enough.

Q. Who was the next one?

A. Mate Marinkovich. We call him "Matey".

Q. (Spelling) M-a-t-e? A. M-a-t-e.

Q. Who is the next one?

A. Jerry Marinkovich. Did I mention Jack Fabulich?

Q. Jack Fabulich? A. Jack Fabulich.

Mr. Fall: Is that all?

A. No, there are some more, but he forgot to ask me.

Mr. Fall: He asked you to name the men.

A. Then there was another, brother of the skipper; I call him "Marko Marinkovich.

The Court: Is he a brother?

A. He is a brother to the skipper.

The Court: Brother-in-law?

A. Brother, the last one I mentioned.

Mr. Fall: Anyone else?

The Court: Were there three Marinkoviches on there?

(Testimony of John Evanisevich.)

A. Three Marinkoviches; two his brothers, and the cook was.

Mr. Gallagher: I think, if your Honor please, Jerry [154] Marinkovich, the cook, stated he was related to the skipper. A. The cook, no.

Q. Can you think of any others?

A. I don't want to mix up any of the names.

The Court: Just answer. You don't have to explain every time: Zorotwich, Botovich, Cvintanich, Markovich—Matey Markovich, Jerry Markovich, and Marinko Markovich. That is six.

Mr. Gallagher: Jack Fabulich. Did your Honor get that one?

The Court: No, I didn't get that one.

Mr. Gallagher: My count makes eight, including the libelant.

A. I got some more.

Q. Name them. A. Jack Vitilech.

Q. Was he in the crew?

A. Jack Vitilech was in the crew.

Q. How do you spell Vitilech?

A. (Spelling) V-i-t-i-l-e-c-h.

Q. You are sure that Jack Vitilech was on board the boat on the 22nd of September, 1939, the day you were hurt? Please answer yes or no.

A. I am not sure.

Q. Was there any other member of the crew that you will testify was on board on September 22, 1939? [155] A. John Banich.

(Testimony of John Evanisevich.)

Q. How do you spell that? A. B-a-n-i-c-h.

Q. Are you testifying positively that John Banich was on board the day you were hurt, September 22, 1939? Please answer that yes or no.

A. Not exactly.

Q. What other members of the crew were on board the boat that day that you were hurt?

A. I don't think there were any others of the crew, except one besides the crew there was.

Q. I am not asking you beside the crew.

A. All right, I thought you wanted me to say who was it.

Mr. Fall: I think the question was to proceed and name all the men on board the boat.

Mr. Gallagher: Let me repeat those names, and see if you remember any other members of the crew who you say were on board the day of the accident: Yourself, John Zorotivich, Dinco Botovich, Marko Cvitanich, Mate Marinkovich, Jerry Marinkovich, Jack Fabulich, Marico Markovich, Jack Vitalich, and John Banich.

A. I was sure for the first one, except the two last ones I can't tell you exact if they were, because that was thirteen months ago.

The Court: As I understand, you are not sure whether Vitalich or Banich were on? [156]

A. Yes; all the rest of it I was sure.

Q. By Mr. Gallagher: What kind of work did Zorotivich do on that day of the accident, that you saw him doing?

(Testimony of John Evanisevich.)

A. Three Marinkoviches; two his brothers, and the cook was.

Mr. Gallagher: I think, if your Honor please, Jerry [154] Marinkovich, the cook, stated he was related to the skipper. A. The cook, no.

Q. Can you think of any others?

A. I don't want to mix up any of the names.

The Court: Just answer. You don't have to explain every time: Zorotwich, Botovich, Cvintanich, Markovich—Matey Markovich, Jerry Markovich, and Marinko Markovich. That is six.

Mr. Gallagher: Jack Fabulich. Did your Honor get that one?

The Court: No, I didn't get that one.

Mr. Gallagher: My count makes eight, including the libelant.

A. I got some more.

Q. Name them. A. Jack Vitilech.

Q. Was he in the crew?

A. Jack Vitilech was in the crew.

Q. How do you spell Vitilech?

A. (Spelling) V-i-t-i-l-e-c-h.

Q. You are sure that Jack Vitilech was on board the boat on the 22nd of September, 1939, the day you were hurt? Please answer yes or no.

A. I am not sure.

Q. Was there any other member of the crew that you will testify was on board on September 22, 1939? [155] A. John Banich.

(Testimony of John Evanisevich.)

Q. How do you spell that? A. B-a-n-i-c-h.

Q. Are you testifying positively that John Banich was on board the day you were hurt, September 22, 1939? Please answer that yes or no.

A. Not exactly.

Q. What other members of the crew were on board the boat that day that you were hurt?

A. I don't think there were any others of the crew, except one besides the crew there was.

Q. I am not asking you beside the crew.

A. All right, I thought you wanted me to say who was it.

Mr. Fall: I think the question was to proceed and name all the men on board the boat.

Mr. Gallagher: Let me repeat those names, and see if you remember any other members of the crew who you say were on board the day of the accident: Yourself, John Zorotivich, Dinco Botovich, Marko Cvitanich, Mate Marinkovich, Jerry Marinkovich, Jack Fabulich, Marico Markovich, Jack Vitalich, and John Banich.

A. I was sure for the first one, except the two last ones I can't tell you exact if they were, because that was thirteen months ago.

The Court: As I understand, you are not sure whether Vitalich or Banich were on? [156]

A. Yes; all the rest of it I was sure.

Q. By Mr. Gallagher: What kind of work did Zorotivich do on that day of the accident, that you saw him doing?

(Testimony of John Evanisevich.)

A. I know he was on the boat, but he was going to do some work in the engine room.

Mr. Gallagher: May I ask your Honor to order that stricken out? I asked the witness what he saw him doing, if anything. He should tell us what he saw him doing, or say he didn't see him doing anything.

The Court: It may go out.

A. I didn't see him doing anything, except he was supposed to be in the engine room.

Mr. Gallagher: I move to strike out all of the answer after "I didn't see him doing anything."

The Court: It may go out.

Q. By Mr. Gallagher: What if anything did you see Dinco Botovich doing on September 22, 1939?

A. He was going in the engine room, but he wasn't down in the engine room. I don't know what he was doing.

Q. What if anything did you see Marko Cvitanich doing on the day of the accident?

A. He was most of the time up on the pilot house, going forth and back with the boat a couple of times; then he stayed there, looking around, what the mechanics were going to say about his clutch.

Mr. Gallagher: I move to strike out that part of the answer that he stayed there to see what the mechanics were [157] going to do about his clutch, upon the ground that it states a conclusion of the witness, and not anything that he could see him doing.

(Testimony of John Evanisevich.)

The Court: It may go out.

Q. By Mr. Gallagher: Mr. Evanisevich, what did you see Mate Marinkovich doing on the day of the accident?

A. He was around the boat. There was some holes to do, and he was making some brand new, we call them brailers, to bail the fish from the hatch.

Q. Jack Marinkovich was cook?

A. He was.

Q. That is the scoop net you refer to?

A. A brailer scoop net.

Q. That is a small net?

A. The pipe is three feet across, and it is about 16 meters, something like that, long.

Q. Describe it. It is a net, which has a circular piece of metal or wood, and handle, and then the net is attached to this circular pipe.

The Court: It is about three feet across and 16 inches deep?

A. Just before that it was not on the pipe, at the time he was going to make a new one to put on the pipe. I worked with it. It was not knotted. I was to make a new one knotted, and I started it, making a new one, because it is square, this way, and when we knot it, after it is all done, [158] then we put it on the pipe. The pipe is on a pole or stick, and you use it to grab the fish from the hatch.

Q. After Mate Marinkovich finished the work

(Testimony of John Evanisevich.)

he was doing on that brailer scoop net, did you do any work on the brailer scoop net? Please answer yes or no. A. No.

Q. What time did Mate Marinkovich start to work on that brailer or scoop net—just what time?

A. I don't know exactly, because he don't work steady on it. He did a little bit here, and a little bit there; sometime he fixed the scoop net, or something, and then he fixed the boat.

Mr. Gallagher: I move to strike out all the answer, if your Honor please, on the ground that it is not a definite statement of anything, and is not responsive to the question.

The Court: Read the question and answer.

(Record read by the reporter.)

The Court: Denied. Mr. Evanisevich, the Court has asked you several times just to answer the question. Pay attention to the question, and answer it.

A. All right.

Q. By Mr. Gallagher: What if any work did you see Jack Fabulich doing on the day of the accident?

The Court: Do you understand what that question is?

A. Yes.

The Court: What is it? [159]

A. He asked me if I seen what Jack Fabulich was doing.

(Testimony of John Evanisevich.)

The Court: He said what kind of work was he doing. I just want you to answer as to what kind of work he was doing.

A. I seen him—maybe there was so many holes in the net, he fixed some of the holes a little bit. He don't work steady either, doing this.

The Court: What kind of work was he doing?

A. Fixing some little holes in the net.

Q. By Mr. Gallagher: You testify positively that Mr. Fabulich was repairing the net on board the "Blue Sky" on September 22, 1939, do you?

A. Yes.

Q. You saw him doing that? A. Yes, sir.

Q. What if any work did you see Marko Marinkovich doing on board the "Blue Sky" on September 22, 1939?

A. I don't know exactly what he was doing.

Q. You say you don't know exactly. Did you see him doing anything on that boat on that day, to-wit, September 22, 1939?

A. He was around the boat, but can I say this? I don't see any time what he was doing, because I was up at the pilot house doing my work, so I can't say exactly what every man was doing on the boat. I ask if I can say that?

The Court: Yes, it is permissible to say that.

Mr. Gallagher: I move to strike out the answer, that part of it wherein he states, "I was up in the pilot house [160] doing my work," upon the ground

(Testimony of John Evanisevich.)

that it states a conclusion and opinion of the witness, and is not responsive to the question.

The Witness: Can I say a word, please?

The Court: I think you had better consult with your attorney. Go ahead, Mr. Gallagher.

Mr. Gallagher: I did not hear your Honor rule on my motion.

The Court: I will deny the motion.

Mr. Gallagher: I will take an exception.

Q. Mr. Evanisevich, where did you live in the month of September, 1939?

A. In San Pedro.

Q. What street address?

A. 926 14th Street.

Q. Are you married? A. Yes, sir.

Q. Were you living there with your wife during that month?

A. I live with my wife all the time.

Q. What? A. Yes, sir.

Q. Did you sleep on the boat any night in September, 1939? A. No, sir.

Q. Where did you sleep every night in September, 1939? A. At my home.

Q. One of these men that you have mentioned was John [161] Zorotovich, a fisherman?

A. He was a fisherman, the same as me, except he take care——

Q. Please answer the question. The question was: Was he a fisherman? A. Yes.

Q. Was Dinco Botovich a fisherman?

(Testimony of John Evanisevich.)

A. Yes.

Q. Was Marko Cvitanich the engineer?

A. He was the engineer.

Q. What was Mate Marinkovich?

A. He was a fisherman, like myself, working all the work like we do.

Q. Jerry Marinkovich was the cook?

A. Jerry Marinkovich was the cook.

Q. Jack Fabulich, what was he?

A. He was the same as the others on the boat.

Q. A fisherman? A. A fisherman.

Q. And Marico Marinkovich was a fisherman?

A. Marico Marinkovich was a fisherman. He was no fish on the boat before; he just go to the boat to start working the sardine season. He was working with us, to help us work on the nets, and everything. [162]

Q. Mr. Evanisevich, when you got on board the boat, on the morning of the accident, what was the first work you say you did? [164]

A. The first thing, I started to work to repair them scoop nets, like I told you.

Q. What else did you work on, if anything?

A. I have lots to do. I don't do nothing, except finish that scoop.

Q. What was the answer?

(Answer read by the reporter.)

Q. After you finished working on the scoop net did you do any other work on the boat that day? Yes or no.

(Testimony of John Evanisevich.)

A. Yes, a little bit, after I finished, we try to make some meshes in that scoop net.

Q. You perhaps did not understand my question. Did you do any work on September 22, 1939, on that boat, excepting with that net? Yes or no.

A. Yes.

Q. What other work did you do besides the net?

A. As I say, I make a few meshes on the new net. That was all I was doing.

The Court: That was in connection with the scoop net?

Mr. Fall: The second one. There was more than one.

A. The second one. I finished. And the next one after I finished I don't do much; just a little bit, make some new meshes, because I can't keep no track of every minute on the boat.

Q. By Mr. Gallagher: Did you do any work on that boat the day you were hurt, excepting the work on two scoop nets? [165] A. No.

Q. Did you do any work helping to tar the nets, after the Mexican season was over?

A. Yes, sir.

Q. Where was that net tarred?

A. Down at the S. P. slip, by the Fishermen's Cooperative Association.

Q. It was not on the boat when it was tarred, was it?

A. It was on the shore when we tarred it.

(Testimony of John Evanisevich.)

Q. After you tarred the net on shore, where was it taken?

A. It was taken up on the hill, and spread out, to dry it out.

Q. That was on land? A. On land, yes.

Q. Was that same net brought back on board the boat, in preparation for the sardine season?

A. Yes. [166]

Q. Did you help bring it on board?

A. Yes, sir.

Q. How long before the date you were hurt did you bring that net back on board?

A. Oh, around five days; something like that.

Q. Mr. Evanisevich, in addition to tarring the large net, did you do any of the work on the large net on shore?

A. That is, did I repair it, do you mean, the same day or what?

Q. No, you remember when you took the big net off the boat, and took it on shore, after the tuna season was over? A. Yes.

Q. Were any repairs made to that net on shore? That is, were any of the meshes broken?

A. We don't repair the net; only we take it apart and put it on the wharf to dry.

Q. You put it on the wharf to dry?

A. Yes, sir.

Q. After it was dried were any repairs made to that large net on shore? A. No, sir.

(Testimony of John Evanisevich.)

Q. Where was it tarred? A. I don't know.

Mr. Fall: I think counsel is assuming something not in evidence, that the tuna net was ever tarred.

Q. By Mr. Gallagher: Did you do any work on the [167] tuna net, excepting to spread it out on the hill?

Mr. Fall: To which we object as being incompetent, irrelevant and immaterial.

Mr. Gallagher: I will withdraw the question.

Q. Mr. Evanisevich, what kind of a net is used to catch sardines for the trade?

Mr. Fall: To which we object as being improper cross examination.

The Court: Overruled.

A. Sardine net, do you mean?

Mr. Gallagher: Yes.

A. Some of it is nine, some twelve, and some parts it is fifteen thread. Some of the net is one and a quarter inches, some an inch and a half, some used to be one inch and three-quarters or five-eighths; something like that.

Q. What kind of a net was on the "Blue Sky" for catching sardines for the trade?

Mr. Fall: That is objected to as being indefinite. He doesn't say whether 1920 or 1940.

Mr. Gallagher: 1939, in September.

Mr. Fall: What time in September?

Mr. Gallagher: At any time in September.

Mr. Fall: To which we object, your Honor, as not being material.

(Testimony of John Evanisevich.)

The Court: Overruled. You may answer what kind of a net was there for catching sardines just before you were [168] hurt.

A. A sardine net.

The Court: Go ahead.

Q. By Mr. Gallagher: How many fathoms was the sardine net?

A. Exactly I couldn't tell you, but it was around —I can't just tell you.

Q. Just approximately.

A. Approximately—I can't give it to you exactly. I wasn't taking care of that alone, except they were talking about it.

Q. It was over a hundred fathoms?

A. It was over two hundred fathoms, so far as that goes.

The Court: You have your answer. Go ahead.

Q. By Mr. Gallagher: Where did you get the sardine net to put it on board the boat?

A. After we——

Q. Not after anything. Where did you get it to put on board the "Blue Sky" in September, 1939?

A. What date you mean?

Q. No, where did you get it?

A. I can't get you what you mean.

Q. Was the sardine net on the boat when you came back from Mexico? A. No, sir. [169]

Q. When was the sardine net put on board the "Blue Sky"?

(Testimony of John Evanisevich.)

A. On the 21st of September, late in the evening.

Q. Where did you get the sardine net to put it on board the vessel?

A. It was on the wharf; then we put it on the boat.

The Court: The Court will limit the cross examination on this point.

Q. By Mr. Gallagher: Had you done any work on the sardine net before you saw it on the wharf, in September, 1939?

A. I was working to hang it, and finish it.

Q. Where was that work done?

A. That was——

Q. Where?

A. It was done out in the harbor—You mean, at what place?

Q. On board the vessel, or on shore?

A. On shore.

The Court: Just a minute. How much more of this do you have in mind asking?

Mr. Gallagher: That is all.

Redirect Examination

Q. By Mr. Fall: This is not really redirect examination; just one question I would like permission to [170] ask him: Mr. Evanisevich, did you suffer or have any injury to your left shoulder, from the time that you got off, after you got off the boat, on the 22nd, until you went to see Dr.

(Testimony of John Evanisevich.)

McCracken a few days later?

A. Excuse me; please explain it again.

The Court: Read the question.

(Question read by the reporter.)

A. Do you mean if I had suffering with my arm after I got hurt?

Q. By Mr. Fall: Did you hurt your left shoulder at any time after you left the boat, and before you got to Dr. McCracken?

A. No, after I got hurt on the boat, that was the time I hurt my arm.

Q. You never had any other injury to your left shoulder? A. No, sir.

MARKO BODICH,

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Fall: How do you spell your name? [171]

A. B-o-d-i-c-h.

Q. Mr. Bodich, what is your occupation?

A. Fisherman, and president of the Fishermen's Cooperative Association.

Q. What is the Fishermen's Cooperative Association?

A. It's the group of the Boat Owners Association.

(Testimony of Marko Bodich.)

Q. Of the boat owners? A. Yes.

Q. Is Tom Mason a member of the Fishermen's Cooperative Association? A. Yes, sir.

Q. What does the Association do?

Mr. Gallagher: That is objected to, if your Honor please, upon the ground it is immaterial, and does not prove or tend to prove any issue in this case.

The Court: Sustained.

Q. By Mr. Fall: Is the Fishermen's Cooperative Association the representative of the Boat Owners—its members?

Mr. Gallagher: I object to that upon the ground that it calls for the conclusion and opinion of the witness, and it would not be relevant to any issue in this case.

The Court: Sustained.

Q. By Mr. Fall: Did the Fishermen's Cooperative Association negotiate an agreement with the United Fishermen's Union—— [172]

A. Yes, sir.

Mr. Gallagher: I move to strike the answer. I don't think counsel finished with his question.

Mr. Fall: No.

The Court: Read the question, please.

(Question read by the reporter.)

Q. By Mr. Fall: ——in March, 1939, with reference to the employment of the members of the Fishermen's Union by the members of the Fishermen's Cooperative Association?

(Testimony of Marko Bodich.)

Mr. Gallagher: That is objected to upon the ground that it calls for the conclusion of the witness, and upon the further ground that it is immaterial.

(Discussion.)

The Court: Will you read the question?

(Question read by the reporter.)

The Court: That at least calls for a conclusion. It was objected to in part on that ground.

Q. By Mr. Fall: Did they negotiate a contract—Withdraw the question.

Mr. Gallagher: I think we can save time, if your Honor please. I don't want to put any technical blocks in the way of the libelant. I will stipulate with the libelant that he has in his hands the contract that was executed by and between the Fishermen's Cooperative Association and the United Fishermen's Union of the Pacific. I will further stipulate that Mr. Tom Mason alone was a [173] member of the Fishermen's Cooperative Association, and if counsel states that the plaintiff was at all times mentioned in this lawsuit a member of the United Fishermen's Union of the Pacific I will stipulate that is the fact.

Mr. Fall: He was.

Mr. Gallagher: But I will object to the contract upon the ground that it is not material to any issue in this case, and upon the further several grounds that it is not competent as proof of any fact in this case; that it is hearsay.

(Testimony of Marko Bodich.)

Mr. Fall: If your Honor please, Mr. Mason has testified that he is one of the owners and partners owning the "Blue Sky". I will further show that he is not only one of the owners; we have also shown he is the master and also that he was the managing owner.

Mr. Gallagher: I will stipulate with you that he was the managing owner. I would like to suggest, if your Honor has no objection that Mr. Fall state what his purpose is in offering the contract, and then we might get somewhere.

Mr. Fall: Your Honor, I intend to show by this contract that there was an obligation on the part of the "Blue Sky" to employ this libelant for the season, for the sardine season, under a particular paragraph in this agreement which states the period of the employment.

Mr. Gallagher: If that is the purpose I object to [174] the introduction of the contract upon the following grounds: Severally, it is not competent for the proof of any such fact, and it is not material to any issue here.

Mr. Fall: We have shown that the man was employed. Now, we are entitled to show by this contract, which sets it forth, the period of the employment. That is the thing that Mr. Gallagher was asking for the other day. He thought if there was a contract it should be shown. We have the contract, and I submit to your Honor that the "Blue Sky" is bound by this contract.

(Testimony of Marko Bodich.)

The Court: You have not shown to the Court yet the part that you desire to offer.

Mr. Fall: I desire to offer paragraph 14.

Mr. Gallagher: Mr. Fall, will you stipulate that Mr. Mason's signature is not anywhere contained on that document?

Mr. Fall: Yes, that is correct.

The Court: Just these four lines in paragraph 14?

Mr. Fall: I think the whole of 14, Section A, sets forth the terms of employment; if the man doesn't show up he was to be docked at a certain rate, and certain things will happen. I think it is material.

Mr. Gallagher: I don't think it is material for any purpose, your Honor, nor competent for proof of any fact disputed here.

The Court: Objection overruled. Let it be [175] received—that particular part.

Mr. Gallagher: Note an exception.

The Court: It will be marked Libelant's Exhibit 1.

Q. By Mr. Fall: Mr. Bodich, is this your signature to the contract? A. Yes.

Q. You are president of the Fishermen's Cooperative Association? A. Yes, sir.

Q. Did you sign this by the direction of the Fishermen's Cooperative Association?

A. Yes, sir.

(Testimony of Marko Bodich.)

Mr. Gallagher: Just a minute. That is objected to upon the ground that it calls for the conclusion of the witness, and I move to strike out the answer.

The Court: It may go out.

Q. By Mr. Fall: This is the signature of John Rasson? A. Yes.

Q. You have seen his signature?

A. Correct. John Rasson is business manager of the Union. This seems to be his signature. [176]

Q. By Mr. Fall: Mr. Bodich, how long have you been fishing on this coast?

A. On this coast I have been fishing since 1928, in Southern California.

Q. Are you familiar with sardines?

A. Yes, quite a bit.

Q. Have you fished them very often?

A. Fished?

Q. Yes. A. I have fished every season.

Q. For how long?

A. I started fishing sardines in 1930.

Q. 1930? Have you fished mackerel?

A. I did not do much fishing of mackerel. Once in a while we get mackerel with the sardines.

Q. Are you familiar with the mackerel?

A. Yes, quite a bit.

Q. Is a sardine from the mackerel family?

Mr. Gallagher: I object to that upon the ground that no proper foundation has been laid. The mere

(Testimony of Marko Bodich.)

fact that [178] the man is a fisherman would not qualify him to specify the different families. In support of my objection I would like to take the witness on voir dire.

Mr. Fall: I will withdraw the question, your Honor, and I submit Webster's International Unabridged Dictionary. I think it is conclusive as to the definition of what a mackerel is, and what a sardine is.

The Court: The answer will go out, and the question remains unanswered.

Q. By Mr. Fall: Mr. Bodich, you have been a boat owner, have you, for some time?

A. Yes, sir.

Q. For how long?

A. I have been a boat owner all this time I have been fishing in the State of California, and previous years up north. In fact, I have been a boat owner ever since I have been in the fishing business.

Q. How long has that been?

A. I started in 1910.

Q. From 1910 up to the present time you have employed men as fishermen? A. Yes, sir.

Q. But at the present time you don't have your boat; the government has it? Rather, you sold it to the government? A. Yes. [179]

Q. Do you know whether there was on the Pacific Coast a custom with reference to the period of time a fisherman is employed for, when he is em-

(Testimony of Marko Bodich.)

ployed as a member of the crew of a fishing boat? I will ask you to answer "Yes" or "No".

Mr. Gallagher: I object upon the ground that it calls for the conclusion and opinion of the witness, and is not the proper way to prove the existence of a custom.

(Discussion.)

Mr. Gallagher: We will save time, if your Honor please, I will withdraw the objection to the form of the question, and put the objection on this ground as to the merits: Whether there was or was not a purported custom, such custom would be immaterial, and there is no proper foundation laid showing that any custom was taken into account by either of the parties to this particular action.

The Court: Overruled. You may answer.

Mr. Gallagher: Exception.

A. Am I to answer?

The Court: Yes, answer.

A. In the past history of fishing that I did it used to be up to the individual boat owners to hire; he could make arrangements with the men; but after 1934, I believe——

The Court: This has reference to 1939, the summer of 1939 and the fall of 1939.

Mr. Gallagher: May it be understood that this entire [180] line is subject to the same objection and exception?

The Court: Do you agree to that?

Mr. Fall: That is agreeable, yes.

(Testimony of Marko Bodich.)

The Court: It is satisfactory to the Court.

Q. By Mr. Fall: Referring to 1939.

A. In 1939 the customary and usual way was to sign the contract; we have the working agreement signed with the union, and the men are hired.

The Court: He is not asking about the contract, Mr. Bodich.

Mr. Fall: Just the custom.

The Court: You were asked, Mr. Bodich, what is the custom among fishermen in this locality here. I don't believe that was added.

Mr. Fall: I put it, this coast.

The Court: The Pacific Coast.

Mr. Fall: The Pacific Coast.

A. Your Honor, I believe I can explain right now; I get the idea: We usually negotiated with the individual fisherman——

The Court: No, that won't be an answer.

Q. By Mr. Fall: You say there is a custom. What is the custom, Mr. Bodich?

The Court: Among fishermen on the Pacific Coast, in the vicinity of Los Angeles, if you know? Is there such a custom? [181]

A. The custom is that the fishermen ask the captain for a chance on the boat.

Q. By Mr. Fall: What is the period for which he is employed?

A. If he is for the season——

The Court: Read the answer.

(Answer read by the reporter.)

(Testimony of Marko Bodich.)

The Court: If he is employed for how long?

A. If he is employed the season of fishing, which is two in the local port—two seasons——

Q. By Mr. Fall: You have two seasons? If the man is employed for one season it does not mean that he is employed for the two seasons? It just means one of those two seasons?

A. One season, yes.

Q. You have referred to two seasons; one of those seasons is the tuna season and the other the sardine season? A. Yes.

Q. When you refer to the two seasons, one was the tuna season and the other the sardine season?

A. Yes.

Mr. Fall: That is all.

Cross Examination

Q. By Mr. Gallagher: Mr. Bodich, since 1934 you [182] say you have hired a great many fishermen? A. Yes, sir.

Q. You say fishermen would come to you and ask you for a chance, is that right?

A. Correct.

Q. Then you would try him out?

A. Correct.

Q. And if he suited you then you would hire him?

A. We hire him in the first place.

Q. Just answer my question "Yes" or "No": If he suited you you hired him? A. Yes.

(Testimony of Marko Bodich.)

Q. Were you fishing in 1939? A. I was.

Q. Were you fishing in October, 1939?

A. I was.

Q. Was there at that time, that is, in the month of October, 1939, a strike or a jurisdictional dispute between the CIO and the American Federation of Labor, in the canneries?

A. Yes, sir, that was June and July, I believe; two months.

Q. It was up in San Francisco, in October, wasn't it, a 15-day strike, a jurisdictional dispute between the CIO and the American Federation of Labor, in the canneries?

A. That is correct. We did not go out fishing.

[183]

Q. The reason you did not go out fishing in San Francisco in October, 1939, was because your union, members of the crew, would not cross any picket lines being maintained around the canneries, is that right? A. Correct.

Mr. Fall: I object as calling for the conclusion of the witness.

(Discussion.)

The Court: Objection overruled.

Q. By Mr. Gallagher: Mr. Bodich, in your experience in hiring men, fishermen, how long have you been hiring members of the United Fishermen's Union of the Pacific?

A. Since the union was organized.

Q. When was that?

(Testimony of Marko Bodich.)

A. I believe it was 1934 or '5.

Q. Just approximately—I am not trying to trap you into some date; did you ever have any of those fishermen quit before the season was over?

A. We did.

Q. With your consent or without your consent?

A. Without our consent.

Q. That has happened very often?

A. It happens pretty nearly quite often on the different boats. We have different boats in our organization. Not with me; about twice with me in the last four years. [184]

JOHN EVANISEVICH,

the libelant, recalled by Mr. Gallagher:

Q. By Mr. Gallagher: Mr. Evanisevich, how long have you been a member of the United Fishermen's Union of the Pacific?

A. Since 1933.

Q. Since 1933 have you engaged as a fisherman here on the Pacific Coast? A. Yes, sir.

Q. In sardine fishing?

A. Up in San Francisco.

Q. Will you explain to the Court how that fishing is done? By that I mean, what do you do with the sardines when you catch them?

A. What we do with the sardines when we catch them?

(Testimony of John Evanisevich.)

Q. Do you take them to the shore?

A. I used to work, take them to what they call——

Q. Cannery?

A. Outside the steamer; they call it a reducing plant, and then sometimes we take them to the canneries.

Q. These reducing plants are what, steamers?

A. Steamers.

Q. If you didn't take them to the steamer, you would [185] take them to the canneries?

A. When we were working for the steamers we would take them to the steamers; when we was working for the canneries, to the canneries.

Q. In San Francisco did you do any sardine fishing in 1939? A. No, sir.

Q. On these other vessels, when you have been hired, did you work every season from 1933 to September 1939? A. Yes, sir.

Q. That is, each year you would work the tuna season; then you would also work the sardine season? A. Yes.

Q. Did you ever quit your job on any of those boats before the season was over? A. No, sir.

Q. Did you ever see any other fishermen on any boat that you were on quit before the season was over? A. Yes, I did.

Q. How many?

A. A couple or three, during the whole of this time.

(Testimony of John Evanisevich.)

Q. I don't mean for sickness now; I mean, they just quit work because they felt like it?

A. Yes, they went off the boat.

The Court: Will you read the answer?

(Answer read by the reporter.) [186]

Q. By Mr. Gallagher: They were not hurt or sick? A. They went to another place.

Q. They quit their job, and went to work on another boat, is that it? A. Yes.

MATE MARINKOVICH,

a witness called by and on behalf of the respondents, being first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Gallagher: Your name is Mate Marinkovich? A. Yes.

Q. What do you do for a living?

A. What do I do?

Q. What do you do for a living? Do you work?

A. Yes.

Q. What kind of work?

A. Fisherman's work.

Mr. Gallagher: If your Honor please, I may have to have some indulgence here, because this witness does not speak as good English as some of the others who have been here. I might have to lead him a little bit.

(Testimony of Mate Marinkovich.)

Q. Were you on the "Blue Sky" on the day Mr. [187] Evanisevich was hurt? A. Yes.

Q. What did you do that day?

A. Nothing.

Q. What did Mr. Evanisevich do that day?

Mr. Fall: Just a minute. To which we object as calling for the conclusion of the witness. He is entitled to say what he saw him do.

The Court: Yes, I think so.

Q. By Mr. Gallagher: What did you see Mr. Evanisevich do on the day of the accident?

A. Nothing.

Q. Did you see him all day when he was on the boat? A. Yes, all day, until 2:30.

Q. Until 2:30? A. Yes.

Q. Did he work on any net? A. Nothing.

Mr. Fall: I ask that the answer be stricken as calling for the conclusion of the witness.

The Court: It is denied.

Mr. Fall: I think he would be entitled to say he saw him.

The Court: The Court has that in mind.

Q. By Mr. Gallagher: What part of the boat were you on all that day until 2:30? [188]

A. Me?

Q. Yes, you.

The Court: If there is anybody here who can act as interpreter for this man I wish he would be called.

Mr. Fall: Part of the family.

(Testimony of Mate Marinkovich.)

The Court: The Court has no objection to that.

Mrs. Helen Mason: I can interpret. I am his sister-in-law.

Mr. Fall: Are you the wife of Tom Mason?

Mrs. Mason: Of Tom Mason, yes.

(Mrs. Helen Mason was here sworn as interpreter.)

Mr. Gallagher: Will you please repeat exactly what I say to him, in his language, and then when he answers you will repeat in English exactly what he says. Don't add anything to it; don't leave anything out.

Q. Tell the Court whether you were in a position to see Mr. Evanisevich all day on September 22, 1939.

A. He said that Mr. Evanisevich was there at about 2:00 o'clock. They left the boat, and he was there all the time, and didn't do anything.

Mr. Fall: I ask that the answer go out.

The Court: Yes, it may go out.

Mr. Gallagher: That is not responsive. I will re-frame the question. Will you tell the Court whether you were on deck of the "Blue Sky" all day on September 22, until you got off the boat? [189]

(Mr. Evanisevich here interprets.)

The Interpreter: He claims nobody work anything that day.

Mr. Fall: I will say to my client that I think

(Testimony of Mate Marinkovich.)

he will probably get it mixed up unless you repeat it the same thing Mr. Gallagher did.

The Court: You had better stay out of it. Mr. Dewing is a good reporter, but he can't take down what two or three of you say at the same time. Let me ask you this question: Did you see Mr. Evanisevich on the morning of the day when he got hurt? Tell him to answer "Yes" or "No".

A. Yes, he was there from 8:00 o'clock to 2:30, in the afternoon.

Q. Did you see him all day before he got hurt, after he came on the boat?

A. He did. They were together.

The Court: Go ahead.

Q. By Mr. Gallagher: Did he do any work of any kind on that boat that day? A. No.

Q. What did you see him doing on the boat?

A. Nothing. [190]

Q. By Mr. Gallagher: Mr. Marinkovich, will you tell the Judge whether Mr. Evanisevich was under the influence of liquor at the time he fell down?

Mr. Fall: To which we object again, as not tending to prove or disprove any issue before the Court. It certainly is not directed to any particular amount of influence. I think it is indefinite.

The Court: Overruled.

Mr. Fall: Exception. [192]

A. Mr. Evanisevich was drunk, not too drunk,

(Testimony of Mate Marinkovich.)

but he was drunk enough that he wasn't sober. He was drunk.

Cross Examination

Q. By Mr. Fall: Did anyone tell you to say in court today that Mr. Evanisevich was drunk on September 22, 1939? A. No, sir.

(At this point there was an adjournment until 2:30 o'clock in the afternoon.)

Friday, October 25, 1940, 2:30 o'clock, P. M.

MATE MARINKOVICH,

resumed the stand and testified as follows:

Q. By Mr. Fall: If your Honor please, there is a man here, that I believe will certainly qualify as an interpreter. His name is Mr. Ivankovich. He is not a party to the action, or related to any of the other parties to it. And I think that would be better.

The Court: If he speaks well.

(George Ivankovich was here sworn as interpreter in the Croatian language, and acted as interpreter during the examination of this witness.)

Q. By Mr. Fall: Mr. Marinkovich, what time did you [193] go on the "Blue Sky" on September 21, 1939? A. 8:00 o'clock in the morning.

Q. Who was present when you arrived?

A. Marko Cvitanich.

(Testimony of Mate Marinkovich.)

Q. Anyone else?

A. He only found this fellow. He don't know.

Mr. Gallagher: What is the answer?

A. He said he only find this man.

The Court: Use the same words he uses. If he says "I" you say "I".

A. He did not say "I".

The Court: What did he say?

A. He said he can only find one man on the boat.

The Court: Who could?

A. He could only find one on the boat.

The Court: Didn't he say "I could only find one man on the boat"?

Mr. Gallagher: I think the interpreter thinks the Judge said he could only find one man on the boat.

A. He said I find Marko on the boat, and after five minutes the rest of the crew arrived.

Mr. Gallagher: May it be stipulated that whenever the interpreter uses the second person the reporter should use the first person and say "I said"?

Mr. Fall: Just explain it exactly; use the same words that he says. [194]

Q. Who is the next man to come aboard the boat, after you arrived?

A. Jack Fabulich then arrived next.

Q. Who arrived next?

A. I don't know. I didn't watch who came after.

(Testimony of Mate Marinkovich.)

Q. How many men were on board the "Blue Sky" at 10:00 o'clock in the morning?

A. Nine men. There was nine men.

Q. Did the "Blue Sky" remain in San Pedro all morning? A. Yes.

Q. Was the "Blue Sky" taken out in the channel to try out the clutch?

A. I am not sure. I don't know.

Q. Were you on the boat all morning?

A. Yes, I was.

Q. You don't remember whether the boat was taken out to try out the clutch, is that right?

Mr. Gallagher: That is objected to upon the ground that it would be immaterial, if your Honor please, in that there is no evidence proving or tending to prove that any employment which might have existed, so far as the libelant is concerned, would require him to do anything with trying out the clutch. He doesn't claim that he was employed as an engineer; and he doesn't claim that he did anything about the clutch on the day of the accident. He claims that he was a fisherman, and he says that the only work he did was [195] either making or repairing the brailer.

Mr. Fall: That was not the purpose of the question.

The Court: Hasn't he already stated that he did not know?

Mr. Gallagher: He said he wasn't sure.

(Testimony of Mate Marinkovich.)

Mr. Fall: I want to find out if it is because he did not remember.

The Court: You may ask him. Overruled. I think you had better change your question.

Mr. Gallagher: May I inquire of counsel if the purpose of this line is merely to test his recollection?

Mr. Fall: That is correct.

Q. Just what did you do on the "Blue Sky" when you arrived at 8:00 o'clock in the morning?

A. Nothing.

Q. Where did you go on the "Blue Sky" when you arrived at 8:00 o'clock in the morning?

A. I stayed in the boat, and talking to the other crew that were on the boat at the time.

Q. That were on the boat at the time? What part of the boat did you stay on?

A. I was in the kitchen at the time.

Q. You were in the kitchen? A. Yes.

Q. How long did you stay in the kitchen?

A. I don't know how long I stayed. [196]

Q. Who else was in the kitchen with you?

A. Jack Fabulich.

Q. Where is the kitchen located on the "Blue Sky"? A. On the center of the boat.

Q. Did you stay in the kitchen until 11:00 o'clock?

A. I stayed in the kitchen, and just off on the deck once in a while.

(Testimony of Mate Marinkovich.)

Q. About how long were you in the kitchen between 8:00 o'clock and 12:00 o'clock noon on September 22nd?

A. I don't know exactly how long.

The Court: Mr. Fall, I think we are taking up too much time, and that applies to Mr. Gallagher as well, but nevertheless the Court thinks you are taking up too much time on these matters. I want you to ask the questions as directly as you can, and finish this phase of the examination. As I say, I realize that Mr. Gallagher did the same thing, but nevertheless the Court should have stopped him just as well.

Q. By Mr. Fall: Were you in the kitchen two hours? A. I don't know.

Q. Was Jack Fabulich in the kitchen with you the whole time you were in the kitchen?

A. He got out, outside, and back in the kitchen again.

Q. Where was Mr. Evanisevich when you were in the kitchen? [197]

A. I don't know if he was in the kitchen or outside, but he just goes forth and back.

Q. Did anyone tell you to go aboard the "Blue Sky" on September 22nd?

The Court: Repeat the question.

(Question read by the reporter.)

Q. By Mr. Fall: Did anybody tell you to come there on the day that Mr. Evanisevich was hurt?

(Testimony of Mate Marinkovich.)

A. No.

Q. Where was Mr. Evanisevich when you saw him drinking beer? Where was Mr. Evanisevich then?

A. He was outside on the deck, and in the kitchen. He was all around.

Q. Were you in the pilot house at any time?

A. Yes, I was. I came in and go out again.

Mr. Gallagher: What is the answer?

(Answer read by the reporter.)

Q. By Mr. Fall: What time?

A. It was 11:00 o'clock, until 2:00 o'clock in the afternoon.

Q. You were in the pilot house from 11:00 o'clock until 2:00 o'clock in the afternoon, is that correct? A. I was inside and outside.

Q. What time was it that you saw Mr. Evanisevich have the first can of beer?

A. I don't know. I am not sure. It was 11:00 or [198] 11:30.

Q. Where was he?

A. He was in the kitchen, and out again; came in again and out again.

Q. Where was he when he had the second can of beer?

A. I don't know where we were, but talking about Ham and Eggs.

Q. That was the last can of beer he had, wasn't it? A. No.

(Testimony of Mate Marinkovich.)

Q. How many cans did he have before lunch?

A. I don't know how many he had.

Q. How many did he have during lunch?

A. Who knows? I don't know. I didn't watch everybody.

Q. How many did he have after lunch?

A. I know he was drinking right along.

The Court: No. How many did he have after lunch? Tell him to answer that if he knows.

A. He would drink one, and take another one. I don't know how much he had.

Mr. Fall: I ask that the answer be stricken—Everything but "I don't know how much".

The Court: Motion denied.

Q. By Mr. Fall: Did you leave the boat before Mr. Evanisevich?

A. One minute before I gave my hand to try to help [199] him out from the boat, and he refused.

Mr. Fall: I ask that everything be stricken aside from "One minute before".

The Court: Read the question and answer.

(Record read by the reporter.)

Mr. Fall: I think the whole answer should be stricken as being non-responsive.

The Court: It may go out.

Q. By Mr. Fall: Did you leave the boat before Mr. Evanisevich? A. Yes.

Q. How long after you left the boat did Mr. Evanisevich leave? A. Two minutes.

(Testimony of Mate Marinkovich.)

Q. Two minutes, did you say, or a minute after?

A. He said two minutes after.

The Court: Was it two minutes, or one minute?

A. I'm not sure, one or two minutes.

The Court: Go ahead. There isn't very much difference.

Q. By Mr. Fall: His answer is one or two minutes?

A. I am not sure; one or two minutes.

Q. How much beer did you have to drink?

A. I drank one beer. I don't drink much.

Q. Didn't you drink more than one can of beer?

A. One or two; not any more. [200]

Q. How many cans of beer did you see Jack Fabulich drink?

A. I saw him drink three or four.

Q. How many cans did you see John Zorotivich drink? A. He drank six of them cans.

Q. Was he drunk?

A. He never was drunk, but he was happy.

Mr. Gallagher: Just a minute. May I have that? He was afraid did you say?

A. No; happy. He was drunk, but not too much.

The Court: That was John Zorotivich?

Mr. Fall: Yes. How about Dinco Botovich? How many cans did he drink?

A. I don't know. I didn't watch. Who knows?

Q. Did you see him drink any beer?

A. Yes.

(Testimony of Mate Marinkovich.)

Q. Do you recall whether he drank more than one can?

A. I can't say nothing. I don't know.

Q. Did you see Marko Cvitanich drink any beer?

A. I don't know. He drinks wine, but I didn't see him drink beer.

The Court: I think you have proceeded far enough for the purpose of testing this man's recollection.

Mr. Fall: Your Honor, I am doing more than that. I am trying to find out how many cans of beer were drank there. We know how many they had. [201]

The Court: The Court believes that you have proceeded far enough.

Q. By Mr. Fall: Were there any engineers working on the clutch, on the 22nd day of September?

A. There were Marko Cvitanich, and John Zorotivich; they were working on something.

Q. Were there any men working on the engine, or the clutch, who were not members of the crew?

A. No.

Mr. Fall: That is all.

Redirect Examination

Q. By Mr. Gallagher: Mr. Marinkovich, right after you got off of the boat there, did you say anything to Mr. Evanisevich?

Mr. Fall: To which we object as being incompetent, irrelevant and immaterial.

(Testimony of Mate Marinkovich.)

The Court: The Court can't tell just yet. It might be.

Mr. Fall: I will withdraw the objection.

A. I tell him "Let's go home."

Q. By Mr. Gallagher: "I told him he better go home"? A. Let's go home."

The Court: "I told him let's go home."

Mr. Fall: I ask that the answer be stricken as being immaterial. [202]

The Court: The first time it will stand.

Mr. Gallagher: That was only preliminary. Did you say anything to Mr. Evanisevich about helping him off of the boat?

Mr. Fall: To which we object as leading and suggestive.

The Court: Overruled. Proceed.

Q. By Mr. Gallagher: Did you say anything about helping him off of the boat?

Mr. Fall: That is assuming that he had to be helped off.

The Court: Just a moment. The Court will decide this case on the evidence it believes material. This witness is having difficulty in understanding, in many ways; not only directly, but through an interpreter, and we are wasting a lot of time on these matters. If we had a jury it would be some justification for these continual objections on the part of both parties. It is a matter that is not so material, and certainly I think it would not be in error either way, and the Court will not consider

(Testimony of Mate Marinkovich.)

it if it does not believe it is material. Of course, if it is a matter that comes to the protection of your record, I think it is proper for you to make all the objections, and take exceptions, and make motions that you feel advised. And now read the question again. And have him answer. Objection overruled. [203]

(Question read by the reporter.)

A. No, I didn't say nothing.

Recross Examination

Q. By Mr. Fall: Mr. Marinkovich, are you related to Mr. Mason? A. Yes.

Q. What relation? A. I am his brother.

Q. Have you talked about this case with your brother, before you came into court?

A. We talked on our way from San Francisco, but we did not talk about the court.

Q. You never talked about this case with anyone since the day the accident happened?

A. No.

Mr. Gallagher: What did he say after that? [204]

A. He said, "I talked to the lawyer."

Mr. Gallagher: I would like to have the whole of the answer. I don't think the interpreter meant to leave it out.

A. He said, "No, but I talked to the lawyer."

Q. By Mr. Fall: You talked about what you were going to testify in court, with Mr. Fabulich, didn't you?

(Testimony of Mate Marinkovich.)

A. He didn't say anything; he just say what I see.

Q. Did you talk with the cook?

The Court: I don't think you need to proceed any further. He said he talked with Mr. Gallagher about the case, and that is usual. [205]

MARKO CVITANICH,

a witness called by and on behalf of the respondent, having been first duly sworn, testified as follows:

Direct Examination

Q. By Mr. Gallagher: What is your name?

A. Marko Cvitanich.

Q. Where do you live, Mr. Cvitanich?

A. 251 14th Street, San Pedro.

Q. What is your occupation?

A. Fisherman.

Q. Are you also an engineer? A. Yes, sir.

Q. Were you working on the "Blue Sky" in September, 1939? A. In 1939, yes, I did.

Q. Do you remember the day when Mr. Evanisevich was hurt? A. I do.

Q. How did you happen to go on board that day?

A. I happened, because the engine was not working right, you know, and the skipper told me to come down to the boat.

(Testimony of Marko Cvitanich.)

Q. The skipper gave you an order to go down to the boat? A. And check up on the engine.

Q. And check up on the engine? A. Yes.

Q. When did the skipper give you that order?

[206]

A. He gave me the order the night before.

Q. Who was present when he gave you that order? A. I was, myself.

Q. Was Mr. Evanisevich present?

A. No, he was not.

Q. Where did you get that order?

A. I got it home, on the phone.

Q. Did Mr. Evanisevich do any work on board that boat the day he was hurt, that you saw?

A. No, he never did.

Q. Who was helping you that day?

A. Two of my men, assistant engineers.

Q. Who were they?

A. Johnny Zorotovich, and Bodich.

Q. Did you take any trial trip?

A. No, sir, we just go out to the ship.

Q. How far was that from where the boat was tied up in the morning?

A. About two miles.

Q. Was that out in the channel at all?

A. Inside the channel, in San Pedro Bay.

Q. Was the skipper on board at all on September 22, 1939? A. No, he wasn't.

Q. Did you have any occasion to observe Mr.

(Testimony of Marko Cvitanich.)

Evanisevich, or see Mr. Evanisevich on board that day? [207]

A. No, he did not have to come down on the boat, because he did not have to do any kind of work on the boat.

Mr. Hall: I ask that that be stricken.

Mr. Gallagher: No objection.

The Court: It may go out.

Q. By Mr. Gallagher: Did you see Mr. Evanisevich on board the boat that day?

A. Yes, I did.

Q. What was he doing the times when you saw him? A. He wasn't doing anything.

Q. Where did you see him?

A. I saw him there on the deck.

Q. About how many times?

A. I saw him there a lot of times.

Q. What is that?

A. I saw him a lot of times.

Q. What time did you leave?

A. We left about 8:30.

Q. I mean what time did you get off of the boat? A. It was 3 o'clock.

Q. Did you leave after Mr. Evanisevich hurt himself? A. Yes, I did.

Q. Were you on deck at the time Mr. Evanisevich hurt himself? A. Yes, I was.

Q. Did you see Mr. Evanisevich eating or drinking anything [208] that day?

(Testimony of Marko Cvitanich.)

A. Yes, I saw him drinking about six or seven times.

Q. What? A. Cans of beer.

Q. Did you see him eat his lunch?

A. I saw him the first time in the morning, was about 9 o'clock; that was the first can of beer he took.

Q. About 9 o'clock in the morning?

A. Yes. The second time around 10 o'clock. After we had dinner, around 11 o'clock.

Q. Did you see the accident?

A. No, because I just happened to turn around at the time when he fell.

Q. Did you see him immediately before the accident? A. Just before, yes, I did.

Q. What was he doing just before the accident?

A. He was standing there on the rigging, the left foot in the rigging, and the right foot on the deck; then he was holding a can of beer in the right hand, and the left hand he was holding on himself.

The Court: Would you read the answer?

(Answer read by the reporter.)

Q. By Mr. Gallagher: Did you say his left hand was holding on himself, or by himself?

A. Yes, by himself, like this.

Q. Alongside of his body? [209]

A. Alongside of his body.

Q. Was he holding onto the rigging with his hands? A. No, he wasn't holding anything.

(Testimony of Marko Cvitanich.)

Q. How long had you known Mr. Evanisevich before the accident?

A. I know him since I think 1929.

Q. Had you seen him drink beer on other occasions, besides the day of the accident?

A. What do you mean? Some other places?

Q. Yes, had you seen him drink on other days?

A. Other days?

Q. Yes.

Mr. Hall: Just a minute; to which we object. I don't see the purpose of that.

The Court: I think the objection is good.

Mr. Gallagher: I will withdraw the question.

Q. Mr. Cvitanich, state whether in your opinion Mr. Evanisevich was or was not under the influence of liquor at the time the accident happened.

A. Yes, I would say he was drunk.

Q. Did you go to San Francisco during the sardine season in 1939?

A. Yes, I did.

Q. What was the nature of that work up there, and by that question I mean, did you deliver any sardines to ships or vessels at sea, or did you bring them in to canneries on shore? [210]

A. No, we delivered the fish to the shore, to the canneries.

Q. How long would the trips away from the wharf or the canneries last when you would go after the sardines? Would you come back each day, or stay out over night?

(Testimony of Marko Cvitanich.)

A. Sometimes we stayed out over night, most of the time we came in.

Q. When you came in, what did the crew do with the fish, with the sardines?

A. Do you mean where we got a load of fish?

Q. Yes, when you got a load of fish, you brought it in to the wharf, and what did the crew do with the fish? A. Unloaded the fish at the cannery.

Q. Where would they take the fish—just throw it on the dock, or take it in to the canneries?

A. No, just throw it, like an elevator.

Q. Like these escalators out here?

A. Something like that; a great big basket, and dump it alongside of the boat.

Q. Was that taken up into the canneries?

A. Yes, it does.

Mr. Gallagher: Take the witness.

Cross Examination

Q. By Mr. Fall: What relation are you to Mr. Mason? A. He is my brother-in-law. [211]

Q. Do you own part of the boat?

A. Yes, I am.

Q. You fished sardines in 1939, in other places than San Francisco, didn't you?

A. I fished San Francisco.

Q. You fished down here locally, too, didn't you?

Mr. Gallagher: Just a minute. The question is objected to upon the ground that it does not state what for.

(Testimony of Marko Cvitanich.)

Mr. Fall: For sardines.

Mr. Gallagher: What month? It would not be material unless it was part of this particular season.

Mr. Fall: That is just what I am getting at; I am trying to find out if it was.

The Court: I understood it was for 1939. Is there more than one sardine season in one year?

Mr. Gallagher: No, your Honor, but they fish in more than one place for sardines in the season.

The Court: You may answer the question.

A. Your Honor, it was later we came back, and leave for Frisco; we were fishing in Pedro for a while.

The Court: Did you fish in San Pedro?

A. Yes, a while.

The Court: Anywhere else beside San Pedro and San Francisco?

A. No, just the two places.

The Court: Just the two places? [212]

A. Yes.

The Court: During the year 1939, for sardines?

A. Yes. We started fishing in 1939, and in fact we fished in 1940, in San Pedro; came down in January.

Q. By Mr. Fall: You came here about Christmas?

A. Right after Christmas. January, I believe.

Q. To whom did you sell your fish down here?

A. We fished for Van Camp.

Q. Did you sell any to the reduction plant?

(Testimony of Marko Cvitanich.)

A. No.

Q. Whereabouts did you fish, out in the deep water?

A. All over, the islands, and all the deep water.

Q. How far out would you go?

A. Most we would go out from Pedro about 9 hours; that was Santa Cruz Island.

Q. And how many miles would that be?

A. 10 hours?

Q. Yes.

A. It would be about 94 or '5 miles.

Q. About 94 or '5 miles? A. Sure.

Q. How about up at San Francisco, how far out would you go?

A. It all depends. Sometimes we would go outside the lightship, and we would go all around.

Q. How far was the lightship? [213]

A. It is about an hour from San Francisco.

Q. About 90 miles?

A. About that. I never checked it up, because I am the engineer on the boat, and don't check up on the time.

Q. Did you ever go out to the islands off San Francisco?

A. Yes, we used to go around there.

Q. That was over 30 miles?

A. You mean the Farallone Islands?

Q. Yes.

A. I don't believe we fished around there, because the fish were more close.

(Testimony of Marko Cvitanich.)

Q. Did you go out by the Farallone Islands at any time? A. No, we did not.

Q. When you were fishing off San Francisco, about the furthest you went would be about how many miles? A. What did you say?

Q. About how far out would be the furthest you went when you were fishing off San Francisco?

A. Sometimes we would go down to Point Reyes.

The Court: What was the furthest, 20 miles, or 30 miles? A. We would never go very far.

The Court: How far, 15 miles?

A. A couple of miles.

Q. By Mr. Fall: Point Reyes is how far from San Francisco? [214]

A. I can't tell you for sure. It is about 4 hours. I am not sure.

Q. That would be about 30 miles, wouldn't it?

A. That couldn't be 30 miles, when the boat makes about 10 miles; that would be about 40 miles.

Q. How much beer did you have to drink on the 22nd of September?

A. I have about two cans of beer.

Q. Do you know how much beer was left when you went home?

A. I am not sure, because I didn't go in to the icebox and check up on it.

Q. You didn't go there? A. No.

Q. You were working on the engine, in the engine-room? A. Yes.

(Testimony of Marko Cvitanich.)

Q. Most of the day, weren't you?

A. No, I wasn't because I had the engineer working there. I checked up there about an hour; we came back out in a ship, so I didn't have to do any kind of work on the [215] deck at all.

Q. What did you do after you returned to the ship?

A. Stayed on the boat, like the rest of the guys, or walking back and forth.

Q. What were you doing? You stayed on the boat?

A. Stayed on the boat, and that was all; for nothing.

Q. Do you recall what any of the other men had to drink?

A. Some of them guys took one can or two.

Q. Were you drunk?

A. No, sir, I wasn't. I never was drunk, neither.

Q. How about John Zorotovich, was he working with you? A. Yes.

Q. Was he drunk? A. No.

Q. Did he have anything to drink?

A. He had a beer. He never drank much; he had one or two cans himself.

Q. He did not have more than one or two cans?

A. I don't believe he did.

Q. Was anyone else drunk? A. No.

Q. You had beer every day there, in that hot weather, didn't you?

(Testimony of Marko Cvitanich.)

A. Yes. On the 22nd, I believe I bought a case, the first case of beer; and then on the 26th I think there was [216] bought another case of beer.

Mr. Gallagher: I think that is immaterial.

Q. By Mr. Fall: What date did this accident happen? A. It happened on the 26th.

Q. On the 26th? A. Of September, yes.

Q. What day of the week was that?

A. I don't know what day of the week, because we don't check on the days. Lots of times I don't know when it is Sunday. Fishermen don't look up on this time.

Q. Did you work the day before the 26th?

A. No, I didn't.

Q. Did you work on the 24th?

A. No, I didn't. Nobody had to go on the boat, because we did not have to do any kind of work between those days. The last day we worked was the 22nd.

Q. The last day you worked was the 22nd?

A. Yes.

Q. But the accident did not happen that day?

A. It happened on the 26th.

Q. It happened on the 26th?

A. Yes, around 2:30 in the afternoon.

Q. How many were on board the boat at 2:30?

A. We were about eight men.

Q. About eight men?

A. No, it wasn't that many. Wait a minute, because [217] some of the guys left for home before

(Testimony of Marko Cvitanich.)

that. It was Fabulich, me, Matey Marinkovich, and Jerry Marinkovich.

Q. You say you didn't work the day before on the boat? A. No.

Q. How about two days before?

A. I know well I do any kind of work around the boat.

Q. Were you on board the boat the day before?

A. No, I wasn't.

Q. Were you on board the boat two days before?

A. I would tell you the same answer a lot of times before. Why you ask me every time?

Q. How many days before he was injured was the last time you were on board the boat?

A. What did you say?

The Court: Read the question.

(Question read by the reporter.)

A. It was on the 22nd, about four days before.

Q. By Mr. Fall: Four days before?

A. Yes.

Q. Did you work on the boat on the 22nd?

A. No.

Q. How about the 20th? A. No.

Q. How about the 19th? A. No.

The Court: Don't proceed with it any further. That [218] is sufficient.

Redirect Examination

Mr. Gallagher: We will call Tom Mason.

Mr. Fall: At this time, your Honor, we will object to any testimony on the part of Mr. Mason.

(Testimony of Marko Cvitanich.)

He has been in the courtroom throughout this period of time. He is not a party to this action, and the court ruled that he was an interested witness, but this man is not a party to the action any more than the man who has just left the stand, who also was one of the owners of the boat.

The Court: Objection overruled.

Mr. Fall: May we have an exception? [219]

TOM MASON,

recalled as a witness on behalf of the respondent, having heretofore been duly sworn, testified as follows:

Q. By Mr. Gallagher: Mr. Mason, you were master of the "Blue Sky" in 1939?

A. Yes, I was.

Q. How long have you been master of the "Blue Sky"?

A. Since the boat was built, in 1930.

Q. You testified, if I recall, that you were not on the boat on the day when Mr. Evanisevich was hurt? A. No, I wasn't.

Q. Did you talk to Mr. Evanisevich the day before he was hurt? A. Yes.

The Court: Mr. Gallagher, will you keep in mind that this witness has been already rather extensively examined, and not cover those matters twice?

(Testimony of Tom Mason.)

Mr. Gallagher: The reason I am going into this matter now is that my recollection is different from Mr. Fall's. Mr. Fall stated yesterday, I think, that Mr. Mason testified that the day before the accident he had told Mr. [220] Evanisevich to go on board the boat and do some work. I don't remember any such testimony, and I want to cover that subject matter.

The Court: Go ahead.

Q. By Mr. Gallagher: Mr. Mason, do you remember the day that Mr. Evanisevich was hurt?

A. Yes.

Q. You weren't on the boat that day, but you know the day? A. Yes.

Q. Did you have a conversation with Mr. Evanisevich the day before he was hurt? A. I had.

Q. Mr. Mason, state whether you did or did not tell Mr. Evanisevich to go on board the boat on the day of the [221] accident.

A. I didn't tell him to go on the boat.

Q. Did you have any conversation with him, either the day of the accident or the day before the accident, about his doing any work on the boat?

A. No, nothing.

The Court: My recollection about that is, that he testified, when he was on examination before, that about September 21st he called everybody to go to work. That's the notation the court has from his testimony. I think you had better refer to Mr. Dewing's record in regard to it. Proceed.

(Testimony of Tom Mason.)

Q. By Mr. Gallagher: On the day before the accident did you tell any of the men to go to work on the 22nd of September, 1939, if that was the date of the accident?

A. The day of the accident, did you say?

Mr. Gallagher: No.

The Court: The day before.

Q. By Mr. Gallagher: The day before the accident did you tell any members of the crew to go on board the next day?

A. There was my partner; I called him over the phone, and I told him to go down to the boat, and I also called up three or four members of the crew.

Q. Who were the members of the crew that you told to go down on the boat on the day of the accident?

A. John Zorotovich, Zinko Botovich; Fabulich was living [222] on the boat. The cook, I told him to go down also.

The Court: And Mr. Cvitanich, he was your partner? A. That's right.

The Court: He was the one that you called?

A. That's right.

Q. By Mr. Gallagher: Did you call each one of those men on the telephone, or were they all together in one place? [223]

A. I met them on Thirteenth Street, by the coffee house, and I told them.

Q. All of them?

A. All of them, except my partner Cvitanich.

(Testimony of Tom Mason.)

Q. Was Mr. Evanisevich there at that time?

A. No.

Q. Mr. Mason, during the sardine season, right after you got up to San Francisco, was there any trouble or difficulty? A. There was a strike.

Q. What is it? A. There was a strike.

Q. What kind of a strike was it?

A. It was a strike amongst our cannery workers; the C. I. O. and the American Federation have some dispute over it.

Q. Did you do any fishing with your boat during that strike? A. No, I have not.

Q. Why not?

A. On account of the C. I. O. men, they wouldn't cross the picket line; they refused to go out.

Q. Who refused to go out?

A. The C. I. O. members. My crew.

Q. How long was the boat tied up by the refusal of some of your crew members to cross that picket line? [224] A. Two weeks.

Mr. Fall: To which we object as incompetent, irrelevant and immaterial; it is not binding at all upon this libellant.

The Court: He has answered. The answer may stand. Proceed.

Mr. Fall: Exception, your Honor.

Q. By Mr. Gallagher: Mr Mason, in the course of hiring fishermen on the "Blue Sky" in the last couple of years, have you ever had a fisherman at

(Testimony of Tom Mason.)

the beginning of the season, and such fisherman quit before the season was over? A. Yes, I have.

Q. How many?

A. In 1939, four of them quit on me.

Q. Who were they?

A. John Zorotovich was the first one. He only stayed with me when I went to San Francisco for sardines, one month.

Q. John Zorotovich? A. That is right.

Q. Was that the season that commenced right after this accident happened?

A. That is right.

Q. He quit after one month? A. Yes.

[225]

Q. Was that with your consent? A. No.

Q. Who else quit without your consent before the season was over?

Mr. Fall: To which we object. I can't see the materiality here of this line of questioning. It certainly would not prove or disprove any issue before the court in this matter.

The Court: I don't think it is a proper method of proving custom. You may ask him if he knows whether there was such a custom or not.

Q. By Mr. Gallagher: Mr. Mason, do you know whether there has been any custom for the fishermen to quit whenever they pleased, after they signed on, or after they accepted employment?

A. Well, there was a custom before these agreements were drawn, as I stated yesterday.

(Testimony of Tom Mason.)

Mr. Fall: Just a minute. Then I would object.

Mr. Gallagher: He hasn't finished his answer yet. Let him finish.

The Court: Let him answer the question; then you may make a motion to strike.

Q. By Mr. Gallagher: State what you were going to state about a custom, before the agreement. What kind of a custom?

A. That he could quit any time, and I could fire [226] him any time; that was the custom.

Mr. Fall: That is objected to, and I move that the answer be stricken.

Mr. Gallagher: No objection.

The Court: Let it go out.

Q. By Mr. Gallagher: Mr. Mason, since these contracts between the union and the Boat Owners Association, is there any custom for the fishermen to stay in the employment of the boat owners for an entire season, without quitting?

Mr. Fall: To which we object as being an attempt to vary the terms of the instrument.

Mr. Gallagher: I withdraw the question.

Mr. Fall: It is contrary to the express provisions of the contract.

The Court: Overruled. You may answer.

Mr. Fall: Exception.

The Court: Read the question, Mr. Dewing.

(Question read by the reporter.)

A. The custom has been——

(Testimony of Tom Mason.)

The Court: Just answer yes or no; then you may explain it.

A. No, I guess.

The Court: Go ahead now and explain it.

A. Since the agreement was drawn they had to stay in the boat for the season, like the contract stated and [227] we could fire them for good cause, but still they must stay in the boat; still they quit.

The Court: Read the answer.

(Answer read by the reporter.)

Mr. Fall: To which we object as being non-responsive; not necessarily non-responsive; it doesn't appear to be intelligible.

The Court: The objection will be overruled. Do you know what the custom was when a man was hired, in your work of fishing off the coast of California in the Pacific Ocean, fishing sardines—do you know what the custom was, as to the length of employment when a man was hired?

A. There was no length, your Honor, at all, in the custom; before these agreements there was no limit at all that a man could come in a boat.

The Court: But in 1939, I am talking about, September, 1939; that was just before the sardine season started, wasn't it?

A. That is right.

Q. Do you know what the custom was at that time for the employment of a man who was hired to go on one of these fishing expeditions, or who was hired as a fisherman?

(Testimony of Tom Mason.)

A. He was hired for the period of time—well, hired for the season, but, still, as I stated, they don't obey, and they still quit. [228]

Q. Was that the custom or not, for them to act for the entire season? A. There was——

Q. Answer yes or no: Was it the custom for him to act for the entire season? You answer that yes or no, and then you may explain. A. Yes.

Q. Do you have any explanation to make?

A. No.

Q. Does that apply as well to the man who was to get his share of the proceeds, did the same custom apply?

A. The custom applied amongst employees, that when anything arose like that, to discuss the dispute amongst themselves, if they expect to give the man the share and help him, and he work or not, and things like that.

Q. I want to know just one thing, Mr. Mason: What was the custom when a man takes employment on a boat such as yours and such as these other men did here, Mr. Rancovich and Mr. Evanisevich and Mr. Zorotovich and those others—what was the custom with reference to the length of time for which their employment is to continue when they agree to go out with the ship owner for the purpose of catching sardines? Is that for the season or not? A. It is for the season.

Q. And that was for 1939? A. 1939. [229]

(Testimony of Tom Mason.)

Q. By Mr. Gallagher: Mr. Mason, was it customary for a man to stay on the job, without quitting, for the entire season, in 1939?

A. It was, yes.

Q. Now, in 1939, what kind of fishing did you do in San Francisco? A. Sardine fishing.

Q. Tell the judge how many trips you made, whether you stayed out two days, three days, one day, or what, when you were in San Francisco? What was the average trip?

A. The average trip, well, the average trip run about fifteen ton.

Q. Fifteen tons; that is what I mean.

The Court: How long did it take you?

Q. By Mr. Gallagher: Did you go out and stay out say a week, or did you go out and come back each day?

A. I go out now—we go out in the evening, and come back in the morning.

Q. When you come back where do you unload your catch? A. At the cannery.

Q. How do you do that unloading? Who takes it off of the boat?

A. My employees do it, take it off the boat.

Q. The crew? [230] A. Yes.

Q. Who attends to the navigation of the vessel, that is, who plotted the courses? A. I do.

Q. Did you, during that time? A. I did.

Q. How many men slept on board the vessel up in San Francisco?

(Testimony of Tom Mason.)

A. During the fishing we all slept in San Francisco on the boat.

The Court: Mr. Gallagher, for the information of the court, will you inquire as to the size of the vessel?

Q. By Mr. Gallagher: What is the size of the vessel? A. Eighty-one feet long.

Q. What is the gross tonnage, and the net tonnage?

A. The gross is 99, and the net tonnage is 51.

The Court: It is 81 feet long. What is the width? A. The width is 20.

The Court: 20 feet ? A. That is right.

Mr. Gallagher: Take the witness.

Cross Examination

Q. By Mr. Fall: You say you called the cook on the 21st day of September, and told him to go down to the boat, to be on the boat on the 22nd? I beg your pardon—You [231] met him on Thirteenth Street by the coffee house, is that correct?

A. Yes, I met him after we left the boat, and I spoke to him again, and told him to be sure to be down.

Q. You had already talked to him before, while you were on the boat?

A. No, I wasn't talking to him, but I had the intention to tell him, but I didn't.

Q. To make sure about it, didn't tell him on the boat, before you left the boat on the 21st?

(Testimony of Tom Mason.)

A. No.

Q. How many men were working on the boat on the 21st?

A. On the 21st there was all of them there.

Q. Just what did you tell the cook, when you told him to come down on the 22nd? Tell the conversation in front of the coffee house.

A. I told him to get something to eat for the four men; there was going to be four to five men on the boat; to get something for them.

Q. Did you have anything to eat on the 21st, on board the ship? A. On the 21st?

Q. Yes. A. Yes, we had. [232]

Q. Wasn't the boat over in Terminal Island? Didn't you go over to Terminal Island on the 21st? [233]

A. No, we came from the outer harbor with the boat, with the net on, and I don't know what they do the next day, when they was down there.

Q. When did you put the net on the boat?

A. That was the last day before Mr. Evanisevich got hurt.

Q. You had it there by the Fisherman's Co-operative, did you?

A. No, the boat wasn't there.

Q. The net? A. No.

Q. You had just tarred it a few days before, hadn't you?

A. No, it was tarred about a week before that or 10 days, or something like that.

(Testimony of Tom Mason.)

Q. Was it lying out there on the dock some place? A. No.

Q. Whereabouts was it?

A. It was by the highway, way up above the ship, by the highway, in an empty lot.

Q. It wasn't in your home?

A. No. Part of it I have at home.

Mr. Fall: That is all. [234]

Redirect Examination

Q. By Mr. Gallagher: Mr. Mason, where was the net tarred?

A. That was a sardine net. It was tarred by the Fisherman's Cooperative.

Q. I mean, was it on shore?

A. Oh shore, yes.

Q. Was that net repaired before it was taken on board the vessel? A. Yes, it had been.

Q. Where were the repairs made?

A. On shore. [235]

Mr. Gallagher: That's all on behalf of the respondent and claimant. We rest, if your Honor please.

May it please your Honor, all of the evidence of the respondent and claimant having been submitted, I desire to state to the court that I do not believe the court would be justified in finding, nor do I

(Testimony of Tom Mason.)

believe the court would find, on the evidence, that the libelant was, at the time of the accident, drunk, or under the influence of intoxicating liquor, and that being my opinion, and my conviction, I think it is my duty to the court to ask leave to have the amendment to the answer stricken from the file on that [240] particular defense, to wit, the defense predicated upon the contention that any injury sustained by the libelant was the approximate result of intoxication; I ask that that be withdrawn.

The Court: The motion is granted.

Mr. Fall: Mr. Evanisevich, will you take the stand?

Mr. Gallagher: I assume that when a pleading is stricken from the files, and the defense is withdrawn, that the matter of taking depositions to refute that likewise falls?

The Court: Yes. [241]

JOHN EVANISEVICH,

the libelant, recalled in rebuttal, testified further as follows:

Direct Examination

Q. By Mr. Fall: When you left the "Blue Sky", right after, or about the time that Mr. Marinkovich had gone on the dock, did you have any conversation with him at all? A. With who?

Q. Mate Marinkovich, the man that went up just before you did.

(Testimony of Tom Mason.)

A. Mate Marinkovich?

Q. Did you have any conversation with him before you got on the dock? A. No, sir.

Q. Just before you went on the dock?

A. No.

Q. Did he tell you to go home?

A. No. [242]

Q. Did Mr. Mason tell you, on the 25th day of September, 1939, to come down to the boat the next day?

Mr. Gallagher: I object to that on the ground that it is not rebuttal, and it is leading and suggestive. He testified to that in the case in chief.

The Court: I think he did. However, the court thinks there has been so much testimony regarding it, he will let him answer the question. Read the question.

(Question read by the reporter.)

A. He don't see me, but he says to the boys to go in the morning at 8 o'clock on the boat, and when I heard that, then I went on the boat.

Q. Where did that take place? Where did he tell you that?

A. The outer harbor on the boat.

Mr. Gallagher: I object to that as assuming a fact not in evidence.

Q. By Mr. Fall: When did he make the statement?

A. That was the day before I got hurt.

Q. Where was he, and where were you?

(Testimony of Tom Mason.)

A. That was on the boat, in the outer harbor.

Q. How many of the men were on the boat?

A. All the crew was on the boat, before we went home.

Q. Were they all present when that statement was made? A. Yes. [243]

[Endorsed]: No. 10094. United States Circuit Court of Appeals for the Ninth Circuit. Tom Mason, Marco Cvitanich and Mitchell Cvitanich, Owners of Diesel Screw "Blue Sky", her tackle, apparatus, engines, furniture, etc., Appellants, vs. John Evanisevich, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 23, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit

Case No. 10094

TOM MASON, et al.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL AND DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

POINTS UPON WHICH APPELLANTS INTEND TO RELY ON THE APPEAL

(1) That the libellant was not in the service of the vessel at the time he sustained his injury.

(2) That the libellant unnecessarily and for his own pleasure and convenience loitered and entertained, amused and interested himself in matters and things entirely foreign to any service for the ship for an unreasonable length of time after all work which could possibly have been done in or about preparing the vessel for an intended fishing voyage had been completed.

(3) Whether under the general maritime law a seaman is entitled to wages to the end of an express

or implied contract of employment which conceivably might continue for many months during which time many separate voyages would be completed, or whether the right to wages expires at the end of each separate voyage in the event the seaman is injured when preparations are being made for a specific voyage.

(4) Whether a fisherman engaged in repairing or making a fishing net is engaged in maritime service merely because while doing so he is on a fishing boat moored to a wharf, or whether, if injured, under such circumstances he is subject to the workmen's compensation law of the state within which the vessel is located at the time of the injury.

(5) Appellants, by reference thereto, incorporate herein, as further points upon which they intend to rely on this appeal, paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XII, XIII, XIV, XV and XVI of the Assignment of Errors.

Dated: Los Angeles, California, this 27th day of March, 1942.

LASHER B. GALLAGHER,
Proctor for Appellants.

(AFFIDAVIT OF SERVICE BY MAIL—
1013a, C. C. P.)

State of California,
County of Los Angeles—ss.

T. Johnson, being first duly sworn says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 458 South Spring St., Los Angeles, California; that on the 27th day of March, 1942, affiant served the within Statement of points on which appellants intend to rely on appeal, etc. on the Appellee in said action, by placing a true copy thereof in an envelope addressed to the proctor of record for said Appellee at the office address of said proctor, as follows:* "David A. Fall, Esq., 333 West Sixth Street., San Pedro, California"; and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the proctor for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or** there is a

---

*Here quote from envelope name and address of addressee.

**When the letter is addressed to a post office other than "Los Angeles," strike out "and"; when addressed to "Los Angeles," strike out "or."

regular communication by mail between the place of mailing and the place so addressed.

T. JOHNSON

Subscribed and sworn to before me this 27th day of March, 1942.

[Seal] [Illegible]

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Mar. 28, 1942. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH APPELLEE INTENDS TO RELY ON APPEAL AND SUPPLEMENTARY DESIGNATION OF PARTS OF RECORD NECESSARY FOR THE CONSIDERATION OF POINTS UPON APPEAL.

POINTS UPON WHICH APPELLEE INTENDS TO RELY UPON THE APPEAL

(1) There was no issue raised by the pleadings that Appellee waived the pleadings that Appellee waived his right to recover for medical expenses incurred in treatment of his injuries and the court therefore erred in finding Appellee waived his right to recover therefore.

Dated: San Pedro, California, this 17th day of April, 1942.

DAVID A. FALL,
Proctor for Appellee.

AFFIDAVIT OF SERVICE BY MAIL
(C. C. P. 1013a)

State of California,
County of Los Angeles—ss.

Marion M. Fall, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled cause; that affiant's business Address is 333 W. 6th St., San Pedro California; that on the 17th day of April, 1942, affiant served the within Statement of points on which appellee intends to rely on appeal & supplementary Designation of parts of record necessary for the consideration of points upon appeal on the Appellants in said action by placing a true copy thereof in an envelope addressed to the attorney of record for said Appellants, at the business Address of said attorney, as follows:* "458 So. Spring St., Los Angeles, Calif. and by then sealing said envelope and depositing the same, with postage thereon

*Here quote from envelope name and address of addressee.

fully prepaid, in the United States Postoffice at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and/or** there is a regular Communication by mail between the place of mailing and the place so addressed.

MARION M. FALL

Subscribed and Sworn to before me this 17th day of April, 1942.

[Seal] DAVID A. FALL,
Notary Public in and for the County of Los Angeles, State of California.

**When the letter is addressed to a postoffice other than Los Angeles, strike out "and"; when addressed to Los Angeles, strike out "or".

[Endorsed]: Filed Apr. 20, 1942. Paul P. O'Brien, Clerk.

No. 10094.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, Owners of DIESEL SCREW "BLUE SKY," her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

OPENING BRIEF FOR APPELLANTS TOM MASON, MARCO CVITANICH AND MITCHELL CVITANICH.

LASHER B. GALLAGHER,
1220 Rowan Building, Los Angeles,
Proctor for Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

Parker & Baird Company, Law Printers, Los Angeles

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OPENING BRIEF FOR APPELLANTS TOM MASON, MARCO CVITANICH AND MITCHELL CVITANICH.

Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court for the Southern District of California, Central Division, in an action for wages, arising out of an injury sustained by the libellant while he was on the Diesel Screw "Blue Sky," on the 22nd day of September, 1931, which said vessel was at that time moored to a dock in the port of Los Angeles, navigable waters of the United States.

The pleadings in the District Court were: A libel *in rem,* filed by libellant John Evanisevich [Ap. 3];*

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*References are to pages in printed Apostles.

claim of Tom Mason, Marco Cvitanich and Mitchell Cvitanich, as the owners of the vessel "Blue Sky" [Ap. 10]; and their answer to libel [Ap. 17].

The District Court, after trial before the court, ordered judgment in favor of libellant for a share of sardines taken by the vessel during the sardine season subsequent to the date of libellant's injury, said order being signed on March 29th, 1941, and filed March 31st, 1941 [Ap. 21]. Further evidenec was received and on October 8th, 1941, a second order for judgment in favor of libellant for a share of the sardines taken and maintenance was ordered [Ap. 22].

Findings of Fact and Conclusions of Law were filed on February 20th, 1942 [Ap. 24].

Final decree was entered on February 20th, 1942 [Ap. 28].

Appellants have appealed from the final decree pursuant to which it is ordered, adjudged and decreed that the libellant recover the sum of $1,130.78, as libellant's share of the sardines taken, with interest thereon from the 1st day of March, 1942, at 7 per cent per annum; and the further sum of $431.00 as maintenance, with interest thereon from the 12th day of July, 1942, at 7 per cent per annum; and costs of libellant taxed in the sum of $59.81.

The transcript of the apostles on appeal, certified by the clerk of said District Court, includes the following: petition for appeal [Ap. 31], order allowing appeal [Ap. 36], notice of appeal [Ap. 40], bond on appeal [Ap. 37] and citation on appeal [Ap. 1].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages and maintenance arises from Article III, Sections 1 and 2 of the

United States Constitution, which provide that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, c. 20, Secs. 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A. Sec. 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended February 13th, 1925, effective May 13th, 1925 (43 Stat. L. 936, 28 U. S. C. A. Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

On April 15th, 1939, the libellant was employed as a fisherman for the tuna season which was about to commence. Fishing for tuna occurred in Mexican waters. The libellant sustained his injury about a month subsequent to the end of the tuna season. Between the end of the tuna season and the time of the accident, the libellant was employed for the sardine season. Between the time the vessel arrived in the port of Los Angeles, subsequent to the tuna season, and September 22nd, 1939, the date upon which libellant sustained his injury, certain work had been done in and about the repair of a clutch connected with the Diesel engine; said clutch being removed from the vessel, sent to a machine shop on shore, then returned to the vessel and reinstalled therein. The libellant had assisted in taking the clutch out of the vessel. In addition to that work, the fishermen who were em-

ployed for the sardine season did certain work in and about preparing the sardine nets. On the morning of September 22nd, 1939, the libellant came aboard the vessel and although the master was not on board, the vessel was navigated within the harbor for the purpose of trying out the clutch. The libellant had nothing whatever to do in connection with this particular activity. Although the great preponderance of the evidence is that the libellant did absolutely nothing on board the vessel on September 22nd, 1939, he testified that sometime between 8 a. m. and approximately 10:30 a. m. he repaired a scoop net. A scoop net is a small net attached to a metal ring and the ring is attached to one end of a pole. The testimony most favorable to the libellant, with reference to whether he did any work of any kind on September 22nd, 1939, is that all work of every kind and character necessary in order to prepare the vessel and all appliances and equipment appurtenant thereto was completed at approximately 11 a. m. The libellant and the other fishermen then aboard the vessel had their lunch. Lunch was completed at approximately 12 o'clock noon on September 22nd, 1939. The libellant was injured close to 2 o'clock p. m. on said day.

There was a single mast on the vessel and there was some rope or cable rigging from the gunwale on each side of the mast, said rigging being connected to the mast at a point near the tip thereof and there were steps or rungs in said rigging. The vessel was moored portside to the dock and the libellant approached the gunwale at a point where the lower end of said rigging was attached to the gunwale or near the gunwale and stepped upon the gunwale with one foot, putting his other foot on the wharf. By reason of the action of the tide, the vessel was caused

to move sidewise from the edge of the wharf and the libellant's foot slipped. When he slipped he took hold of part of the rigging and as his body dropped he strained or sprained his shoulder and the muscles connected therewith.

The libellant had no duty of any kind or character aboard the vessel from the time he commenced to eat his lunch up to and including the time of the accident. Most of the fishermen had left the vessel for the purpose of going home, prior to the time the libellant attempted to leave. The reason the libellant remained on the vessel after finishing his lunch was that the weather was very hot and he stayed aboard drinking beer because it was so hot [Ap. 65, 68, 96, 97, 98, 99, 117, 118, 119, 120 and 121].

The other fishermen on board testified that Evanisevich had done no work of any kind on the vessel on September 22, 1939 [Ap. 127-130; 145, 147, 195, 197, 203, 210, 211, 212]. The master was not on board at all on September 22, 1939 [Ap. 221].

The District Court, on this evidence, found "that it is true that on the 22nd day of September, 1939, just before the ship started upon its fishing season for sardines, and while the libellant was engaged in the service of his said ship in that he was in the act of departing from said ship after performance of his duties as a member of said ship's crew and while he was subject to call of duty as a member of the crew of said ship which was then and there lying in the navigable waters of the Port of Los Angeles, slipped from a ladder and part of the equipment of said ship, and the adjoining wharf, severely injuring his left arm and shoulder." [Ap. 24, 25.]

Assignment of Errors.

The Assignment of Errors upon which appellants rely are set forth in the Appendix to this brief, and are summarized in the following statement of points involved in the appeal of said appellants.

1. This appeal in admiralty is a trial *de novo*.

2. The libellant was not in the service of the vessel at the time he sustained his injury.

3. The libellant unnecessarily and for his own pleasure and convenience loitered and entertained, amused and interested himself in matters and things entirely foreign to any service for the ship for an unreasonable length of time after all work which could possibly have been done in or about preparing the vessel for an intended fishing voyage had been completed.

4. Under the general maritime law is a seaman entitled to wages to the end of the contemplated term of an express or implied contract of employment which conceivably might continue for many months during which time many separate voyages would be completed, or does the right to wages expire at the end of each separate voyage in the event the seaman is injured while in the service of the vessel?

5. Is a fisherman, engaged in repairing or making a fishing net, engaged in maritime service merely because while doing so he is on a fishing boat moored to a wharf, or if injured under such circumstances is he subject to the provisions of the workmen's compensation law of the State of California within which such vessel was located at the time of the injury? [Assignment of Errors Nos. I, II, III, V, VI, VII, VIII, IX, XI, XII, XIII, XIV, XV and XVI; Ap. 32].

Outline of Argument.

I. This admiralty appeal is a trial *de novo*.

II. The testimony of the libellant conclusively establishes that the libellant was not injured while in the service of the ship.

III. A seaman injured while in the service of the ship is not entitled to wages beyond the end of the specific voyage before the commencement of which or during which the injury occurs.

IV. A fisherman engaged in repairing a fishing net is not engaged in maritime service or in the service of the ship merely because while doing so he is upon a vessel moored to a wharf and under such circumstances the workmen's compensation laws of the state where the accident occurs are applicable.

I.

This Admiralty Appeal Is a Trial de Novo.

It is unnecessary to cite any authority to establish the contention that an admiralty appeal is a trial *de novo*.

II.

The Testimony of the Libellant Conclusively Establishes That the Libellant Was Not Injured While in the Service of the Ship.

According to the testimony given by the libellant, he put in some time prior to 11 a. m. on September 22nd, 1939, repairing a scoop net and while repairing the scoop net the libellant was on board the vessel "Blue Sky." He and the other fishermen commenced eating their lunch at about 11 a. m. on said day and finished not later than 12 o'clock noon. From the time the libellant finished his lunch until he left the vessel which, according to his own testimony, was "around 1:30; close to 2 o'clock" [Ap. 120], he did absolutely nothing but loaf around on the vessel, occasionally having a can of beer, and the only reason he stayed on board was that the temperature was high.

For the law with reference to the right of a seaman to recover wages and maintenance, appellants refer to *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, where the Court says:

> "That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, *in the service of the ship*, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued." (Emphasis added.)

The libellant was injured while on the ship and therefore the important question to be determined is whether he was injured in the service of the ship.

There is no branch of the law where the Courts have interpreted any basic rule more liberally in favor of employees than the various workmen's compensation statutes. The language "in the course of his employment" as used in such statutes is the equivalent of the language "in the service of the ship." Therefore, cases dealing with unncessary loitering upon the premises of an employer are strictly analogous to the question involved in this subdivision of appellants' brief.

In the case of *Makins v. Industrial Accident Commission*, 198 Cal. 698, the rule is clearly stated as follows:

> "The rule is well settled that an employee in going to work, comes under the protection of the Act when he enters the employer's premises or upon the means provided for access thereto, though the premises and such means of access are not wholly under the employer's control and management (Starr Piano Co. v. I. A. C., 181 Cal. 453, 184 P. 860; Judson Mfg. Co. v. I. A. C., 181 Cal. 300, 184 P. 1); and the same rule applies when the employee is leaving such working premises provided he does not unnecessarily loiter thereon (Wabash R. Co. v. Industrial Commission, 294 Ill. 119, 128 N. E. 290; Lienau v. Northwestern Teleph. Exch. Co., 151 Minn. 258, 186 N. W. 945)."

Appellants desire to call particular attention to the last part of this language, to wit, "and the same rule applies when the employee is leaving such working premises *provided he does not unnecessarily loiter thereon.*"

To the same effect is the later case of *Jimeson v. Industrial Accident Commission,* 23 Cal. App. (2d) 634, 73 Pac. (2d) 1238. Cases from other jurisdictions to the same effect are the following:

C. A. Y. Construction Co. v. Smallwood, 104 Ind. A. 277, 10 N. E. (2d) 750;

Grady v. Nevins Church Press Co., 15 N. J. M. 190, 189 Atl. Rep. 668;

Schwartz v. State, 277 N. Y. 567, 13 N. E. (2d) 476. (Please see also: 251 App. Div. 634, 297 N. Y. S. 815.)

These cases, in general, recognize the following principles: The period of employment during which injury may occur and be compensable under compensation acts includes a *reasonable* time for ingress to and egress from place of work while on the employer's premises, and is not limited to the exact moment when the employee reaches the place where he begins his work or to exact moment when he ceases that work, but includes a *reasonable* amount of time and space before and after ceasing actual employment, having in mind all of the circumstances connected with the accident. An injury to an employee is compensable as arising out of employment where the employee is injured in an accident occurring on the premises of the employer, while the employee is entering or leaving the premises *within a reasonable time before or after actual working hours.* Generally, if an employee is injured on the premises of the employer, in going, with

reasonable dispatch and method, to or from actual performance of specific duties of the employment by a way provided by the employer or reasonably used by the employee, compensation must be awarded.

In the case of *Adams v. Uvalde Asphalt Paving Co.*, 200 N. Y. S. 886, the claimant was employed as a laborer at the plant of his employer. At 11:30 on the morning of his accident the claimant and about fifteen others were laid off because of some unforeseen event which made it unnecessary for the employer to make use of those men any longer on that day. Some of the other employees at the plant finished out a full day. The workmen were allowed to eat their lunch on the premises, and the plaintiff did eat his lunch, although the record does not disclose just when he did so. Notwithstanding the fact that he had been laid off at 11:30 a. m., it is agreed that at 1:50 p m. he was proceeding to wash up, preparatory to leaving for home, when he was injured. He was still upon the premises of his employer. He attempted to get his pail, which had fallen in a ditch, for the purpose of getting hot water for washing himself, when his foot slipped into a hole where there was hot water, and he received severe burns, causing the disability for which an award has been made. He was a colored man, and his work caused him to become covered with a white dust. It was the custom of the men to wash up before they left the plant, so that they would have a proper appearance on the train or cars upon which they traveled in going home.

The Court stated as follows:

> "No case has been cited to us where an award has been made to an employee who was injured after having loitered upon the premises after his employment has ceased, and we think that this claimant cannot be deemed to have been injured while going with reasonable dispatch from the premises of his employer after the completion of the duties of his employment, when he remained upon the premises for a period of two hours and twenty minutes after he was laid off, and without any justification therefor, other than the eating of his lunch. He was not in the course of his employment at the time of his injuries, and therefore the award cannot be sustained."

The libellant in the case at bar gives absolutely no legitimate excuse or reason for being on board the vessel at the time of the accident excepting his own desire to loiter there because of the heat. It is probably true that the libellant was engaged in personal conversations with one or two other men who remained on board and that during the afternoon there was considerable drinking of cool beer. Such conduct, however, does not, by any stretch of imagination, put the libellant "in the service of the ship."

III.

A Seaman Injured While in the Service of the Ship Is Not Entitled to Wages Beyond the End of the Specific Voyage Before the Commencement of Which or During Which the Injury Occurs.

Appellants will assume, without in the slightest degree conceding, that the libellant was a seaman and was injured while in the service of the vessel, for the purpose of presenting this question of law for the decision of the Court.

If a seaman has entered into a contract pursuant to which he is employed for a specific term which may include many separate voyages and is injured in the service of the ship during one of the specific voyages contemplated or between the termination of one specific voyage and the commencement of another, is such seaman entitled to recover the entire amount which he would have earned if he had remained in the service of the ship during the entire contemplated term, or is he entitled to recover the wages he would have earned during one of the specific voyages?

Let us assume that a ship-owner enters into a contract pursuant to which a seaman is employed as a deck-hand on a river boat which makes one trip per day between the port of San Francisco and the river port of Sacramento, California; that the term of employment is five years. Let us assume further that the sailing time of the vessel is 6 p. m. and that at five minutes to six he trips, falls and breaks his arm. It is necessary for the seaman to imme-

diately leave the vessel and obtain hospital care and attention. The seaman goes to the Marine Hospital at San Francisco and at the end of three weeks is released, fully cured. Is such seaman entitled to recover what he would have earned during that portion of the five-year period of employment which was unexpired at the time of the injury?

When the rule with reference to the right of a seaman to recover maintenance and cure, at least to the end of the voyage during which he was injured and to his wages to the end of the voyage, was first announced, there were no unions and there was no National Labor Relations Act. Originally each seaman would sign Shipping Articles which contemplated a complete voyage. Under the rules and conditions which now prevail few, if any, seamen are not members of a union of some kind. The unions make contracts with the ship-owners and pursuant to the terms of most of these contracts each member of the union is entitled to be employed indefinitely in the absence of intoxication or certain specified serious infractions of rules. In other words, the ship-owners do not any longer have the right to employ a seaman for a single voyage but must take him as a permanent employee.

The decision of the District Court in *Enochasson v. Freeport Sulphur Co.*, 7 Fed. (2d) 674, at 675, states:

> "Respondent contends that while, under The Osceola, 189 U. S. 175, 23 S. Ct. 483, 47 L. Ed. 760; The Bouker, 241 F. 831, 154 C. C. A. 533, and other cases preceding and following, as to libelant's maintenance and cure, the question of a particular voyage is not controlling, the determinative factor there is the passage of a reasonable length of time after the onset of the illness. It contends vigorously, however,

that the right to wages is limited to the termination of the voyage in the course of which the sickness occurred, which under the facts of this case it contends was April 15, the return of the vessel to Freeport. Libelant contends, on the other hand, that the 'voyage' referred to in The Osceola and other cases means, not a passage to a particular port and return, but the duration of the term of employment.

"I have examined all of the cases cited and available on the point, and find that the lack of certainty which exists in them springs out of the fact that the discussion of the point has always proceeded from an assumption of a rule, without a full statement of the principles upon which that rule is grounded. The Osceola merely states the rules applicable in different jurisdictions, without a discussion of the principles which make those rules sound, and, as is the case where there is only a 'bare bones' statement of a rule, the application of that rule continues to be involved in uncertainty. A slight reflection upon the principles which must be the basis of the rules will, I think, make it clear that the term 'voyage', as used in the authorities, has reference, not to a particular passage from port to port, but to the *whole term of the mariner's employment.*" (Emphasis added.)

The decision of the District Court in the case at bar is in accordance with the decision in the case just hereinabove referred to. Appellants contend that the rule announced in the *Enochasson* case is not equitable.

If a seaman is injured, while in the service of the vessel, as the sole proximate result of his own negligence he is nevertheless entitled, as a matter of right, to his wages to the end of the voyage and to maintenance and cure.

If he is injured while in the service of the vessel as a proximate result of the unseaworthiness of the vessel or of a failure to supply and keep in order the proper appliances appurtenant to the vessel, then he is entitled to compensatory damages in addition to his maintenance, cure and wages to the end of the voyage. If he is injured as a proximate result of the negligence of any of the officers of the vessel or of any fellow crew member he is entitled to maintenance, cure and wages to the end of the voyage and also to compensatory damages under the Jones Act. In an action for indemnity pursuant to the general maritime law or an action for damages under the Jones Act loss of earnings would be an element of damage.

If the rule stated in the *Enochasson* case is literally applied then it would be possible for a seaman to collect thousands of dollars without performing more than ten days of labor as follows: On June 1st, 1941, he enters into a contract for a term of five years. He is injured on the same day and must leave the service of the vessel in order to obtain treatment. Two days later he is cured and makes another contract with another ship-owner for a term of five years. On the same days he suffers the same kind of injury and is incapacitated for the same time. This could proceed *ad infinitum*. Every time the seaman is injured in the service of the vessel and his injury is such as to make it necessary for him to leave the vessel, he would be entitled to his wages for the whole term of his employment, if the rule followed by the learned District Judge is the true rule.

Appellants respectfully contend that when the reason for a rule ceases the rule itself ceases. Seamen are no longer the helpless or ignorant or improvident individuals they once were. As a matter of fact when, in ancient days, seamen were illiterate, the great proportion of land workers were likewise ignorant and illiterate. The public school system as prevalent throughout the United States has resulted in a general improvement in so far as the citizenry is concerned. In ancient times it was true that the seaman was subject to abuse and there were many cruel masters and mates. In those ancient times a seaman had no one to aid him. He could not refuse to obey an unreasonable order while on a vessel. Today the conditions are practically reversed.

The Supreme Court has decided that seamen are entitled to the protection of the National Labor Relations Act. *Vide: National Labor Relations Board v. Waterman S. S. Corp.,* 309 U. S. 206, 84 L. Ed. 704.

In the case at bar the evidence shows that subsequent to the time of the accident the vessel proceeded to San Francisco and proceeded to fish. The men were paid $344.12 each as their share of the profits of the fish caught during "the first dark." [Ap. 88, 89.] It is the contention of the appellants that the voyage, for the purpose of determining what, if any, wage was due the libellant was that period of time up to the first payment of profit to the fishermen and that the libellant was not entitled to a share of the profits for the entire sardine season.

IV.

A Fisherman Engaged in Repairing a Fishing Net Is Not Engaged in Maritime Service or in the Service of the Ship Merely Because While Doing So He Is Upon a Vessel Moored to a Wharf and Under Such Circumstances the Workmen's Compensation Laws of the State Where the Accident Occurs Are Applicable.

Appellants contend that the workmen's compensation laws of the State of California are applicable to the injuries sustained by the libellant if he was injured while in the service of the vessel for the reason that those laws may be invoked without in the slightest degree interfering with the harmony and uniformity of admiralty law.

In the case of *E. V. Parker v. Motor Boat Sales Inc.,* Advance Opinions, United States Supreme Court, Lawyer's Edition, Volume 86, 250 at 252, the Court says:

> "If the conclusion of the Circuit Court can be supported at all, it must be on the basis that the employment, even though maritime and therefore within an area in which Congress *could* have established exclusive federal jurisdiction, is nevertheless subject to state regulation until Congress has exercised its paramount power. Cf. Employers' Liability Assur. Corp. v. Cook, *supra* (281 U. S. 237, 74 L. Ed. 825, 50 S. Ct. 308). Congress having expressly kept out of the area in which 'recovery . . . may . . . validly be provided by state law,' the argument may be made that Virginia would have been unhampered in providing for compensation here.
>
> "The decision of this Court in Southern P. Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, 37 S. Ct. 524,

L. R. A. 1918C 451, Ann. Cas. 1917E 900, 14 N. C. C. A. 597, however, severs a link in this chain of reasoning. For, under the holding of that case, even in the absence of any congressional action, federal jurisdiction is exclusive and state action forbidden in an area which, although of shadowy limits, doubtless embraces the case before us. The basis of the decision, that Art. 3, Sec. 2, of the Constitution extending the judicial power of the United States 'to all cases of admiralty and maritime jurisdiction' is tantamount to a command that no state may interfere with the harmony and uniformity of admiralty law, and that on the facts of that case recovery under a state statute would work such an interference, *was rejected by four dissenting members of the Court.* And when the doctrine of the Jensen case was reaffirmed in Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 64 L. Ed. 834, 40 S. Ct. 438, 11 A. L. R. 1145, 20 N. C. C. A. 635, and Washington v. W. C. Dawson & Co., 264 U. S. 219, 68 L. Ed. 646, 44 S. Ct. 302, 24 N. C. C. A. 253, *sharp disagreement was again expressed in dissenting opinions.* We have *not* been called upon here, however, to *reconsider* the constitutional principles announced in those cases, and we are convinced that such a reconsideration is not necessary for disposition of the case before us.

"What we are called upon to decide is *not* of constitutional magnitude. For, regardless of whether or not the limitation on the power of states set out in the Jensen case is to be accepted, it is not doubted that Congress could constitutionally have provided for recovery under a *federal* statute in this kind of situation. The question is whether Congress has so provided in this statute. The proviso of Sec. 3(a), 33 U. S. C. A., Sec. 903(a), aside, there would be no

> difficulty whatever in concluding it has. For the Act expressly includes within its ambit accidents 'arising out of and in the course of employment' in the case of employees engaged 'in maritime employment, in whole or in part, upon the navigable waters of the United States,' and Armistead's death was the result of such an accident. While the proviso of Sec. 3(a) appears to be a subtraction from the scope of the Act thus outlined by Congress, we believe that, properly interpreted, it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide." (Emphasis added.)

It will be seen from the foregoing that the United States Supreme Court will, whenever this question is again submitted to it, follow the dissenting opinions in the case of *Southern Pacific Co. v. Jensen,* 244 U. S. 205, 61 L. Ed. 1086, 37 S. Ct. 524.

The reason the United States Supreme Court did not go into the question of jurisdiction in the *Parker* case is that "it is not doubted that Congress could constitutionally have provided for recovery under a *federal* statute in this kind of situation."

If there were no federal statute covering the situation involved in the *Parker* case there is little doubt about the fact that the Supreme Court would have held that the sole recourse of the dependents of Armistead was pursuant to the Workmen's Compensation Act of the State of Virginia.

In addition to the foregoing decision, appellants rely upon the following cases:

Surgeon v. Alaska Packers Ass'n, 26 Fed. Supp. 241;

Alaska Packers Ass'n v. Marshall, 95 Fed. (2d) 279;

Alaska Packers Ass'n v. Industrial Acc. Commission of the State of California, 276 U. S. 467, 72 L. Ed. 656, 48 S. Ct. 346.

Conclusion.

Appellants respectfully submit that the final decree of the District Court should be reversed and that this Honorable Court should make findings of fact and upon conclusions of law deduced therefrom, enter a final decree dismissing the libel.

Dated: Los Angeles, June 5th, 1942.

LASHER B. GALLAGHER,

Proctor for Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

APPENDIX.

Assignment of Errors by Appellants Tom Mason, Marco Cvitanich and Mitchell Cvitanich.

I.

The District Court erred in finding that while the libellant was engaged in the service of his said ship he slipped from a ladder and part of the equipment of said ship and the adjoining wharf, severely injuring his left arm and shoulder.

II.

The District Court erred in finding that at the time of libellant's injury he was engaged in the service of his ship.

III.

The District Court erred in finding that the libellant was injured while he was subject to any call of duty as a member of the crew of the "Blue Sky."

IV.

The District Court erred in failing to make any finding whatever with reference to the issue that the libellant was injured while doing his duty and obeying the commands of the master of the vessel.

V.

The District Court erred in not finding in accordance with the uncontradicted evidence that the libellant was not in the service of the ship at the time of his injury.

VI.

The District Court erred in not finding in accordance with the uncontradicted evidence that the libellant, on the day of the accident, had completed any and all possible

service to the ship at a time not later than 12 o'clock noon and that for the sole and exclusive pleasure of the libellant he unncessarily loitered and remained on the vessel until sometime between 1:30 p. m. and 2 p. m. of said day.

VII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of fish caught and sold during the Sardine season subsequent to September 22nd, 1939.

VIII.

The District Court erred in finding that the libellant is entitled to demand and have the ship pay his expenses incurred in and about his support from September 22nd, 1939, to July 12th, 1940.

IX.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any time whatever.

X.

The District Court erred in finding that there is due the libellant for maintenance, the sum of $431.00 with interest at the rate of 7% per annum from July 12th, 1940, or for any sum whatever either with or without interest.

XI.

The District Court erred in finding that all and singular or all or singular the premises are true.

XII.

The District Court erred in finding that the premises are within the Admiralty jurisdiction of said court.

XIII.

The District Court erred in finding that the libellant was entitled to a 1/17 lay or share of the entire proceeds

of the Sardine season subsequent to September 22nd, 1939, for the reason that the Sardine season included many voyages and if a seaman is injured while in the service of a vessel he is entitled at most to wages only to the end of a particular voyage and is not entitled to wages to the end of the period of employment which may have been agreed upon and which may include many voyages.

XIV.

The District Court erred in finding that the subject of the action was within the Admiralty jurisdiction for the reason that the exclusive remedy of the libellant was within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

XV.

The District Court erred in concluding that libellant is entitled to a judgment against respondent in the sum of $1130.78 as wages for the Sardine season ending on or about the 1st day of March, 1940, with interest thereon from said March 1st, 1940, at the rate of 7% per annum and for the additional sum of $431.00 as maintenance from September 22nd, 1939, to July 12th, 1940, with interest thereon from July 12th, 1940, at the rate of 7% per annum.

XVI.

The District Court erred in not concluding that the libellant is not entitled to recover any sum whatsoever from the respondent "Blue Sky" or from the claimants, or any of them, and in not concluding that the libel should be dismissed with costs to the respondent and claimants. [Ap. 32-35.]

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No. 10,094

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

TOM MASON, MARCO CVITANICH and MITCHELL CVITANICH, owners of Diesel Screw "Blue Sky", her tackle, apparel, engines, furniture, etc.,

Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

BRIEF FOR APPELLEE.

DAVID A. FALL,
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Proctor for Appellee.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

On April 15, 1939, the libellant, John Evanisevich, was employed as a fisherman on the Diesel Screw "Blue Sky" for the tuna season which was about to commence. Fishing for tuna occurred in Mexican waters. The libellant sustained his injury about a month subsequent to the end of the tuna season. Between the end of the tuna season and the time of the accident, the libellant was employed for the sardine season, which terminated during the early part of March, 1940. Between the time the vessel arrived in

the port of Los Angeles, subsequent to the tuna season, and September 22, 1939, the date upon which libellant sustained his injury, certain work had been done in and about the repair of a clutch connected with the Diesel engine; said clutch being removed from the vessel, sent to a machine shop on shore, then returned to the vessel and reinstalled therein. The libellant had assisted in taking the clutch out of the vessel. In addition to that work, the fishermen who were employed for the sardine season did certain work in and about preparing the sardine nets and gear used in the fishing venture.

The Diesel Screw "Blue Sky" is a fishing vessel eighty-one feet long with a twenty-foot beam of a gross tonnage of 99 tons and net tonnage of 51 tons. (Ap. 231.)

On the morning of September 22, 1939, the libellant and all of the crew of the "Blue Sky", excepting two, reported on board the vessel. The captain was absent, but Marco Cvitanich, one of the owners, and appellant herein, was aboard. During the morning, among other things, the boat was navigated within the harbor, testing the operation of the clutch. Libellant repaired a scoop net between eight A. M., and ten A. M. Lunch was served to the crew by the ship's cook between eleven A. M., and twelve o'clock noon.

There was a single mast on the vessel and there was a rope or cable rigging from the gunwale on each side of the mast, said rigging being connected to the mast at a point near the tip thereof and there were steps or rungs in said rigging. The vessel was moored

portside to the dock, there being no gangway, the libellant approached the gunwale at a point where the lower end of said rigging was attached to the gunwale or near the gunwale and climbed up the steps in the rigging to a point even with the dock. Then libellant placed one foot upon the dock. As this was done, his foot on the dock slipped and libellant grasped a part of the rigging with his left hand as his body dropped. He thus saved himself from falling to the deck of the vessel, but in so doing sustained serious spraining of his left shoulder and muscles connected therewith. (Ap. 149.)

On September 21, 1939, Captain Mason ordered the crew to report on board the "Blue Sky" at eight o'clock A. M. On the early morning of September 22, 1939, the ship's cook purchased for them, to the account of the "Blue Sky", food for the entire crew. (Ap. 242-243, 136, 144, 145.)

The libellant had remained on board, as it was very hot and he was awaiting the return of the Skipper to determine if all the work had been completed. (Ap. 150.)

The District Court, on this evidence, found "that it is true that on the 22nd day of September, 1939, just before the ship started upon its fishing season for sardine, and while the libellant was engaged in the service of his said ship in that he was in the act of departing from said ship after performance of his duties as a member of said ship's crew and while he was subject to call of duty as a member of the crew of said ship which was then and there lying in

the navigable waters of the Port of Los Angeles, slipped from a ladder and part of the equipment of said ship, and the adjoining wharf, severely injuring his left arm and shoulder". (Ap. 24, 25.)

APPELLEE'S REPLY TO APPELLANT'S CONTENTIONS AND ARGUMENT.

I.

The contention of the appellant that libellant was not injured while "in the service of the ship" is most ingenious; it, however, appears to rest wholly on dicta lifted from the case of *The Osceola,* 189 U. S. 158, 47 Law. Ed. 760, 23 S. Ct., 483, where the particular point of defining service of the ship was nowhere in issue. With equal logic, the libellant answers that the libellant was engaged in a continuous but interrupted voyage for the season, and that at any time the libellant was on the boat he was therefore necessarily in the service of the ship. *Liberty Land,* 1923 AMC 1213, *William Penn,* 1925 AMC 1316.

The American Beauty, 1924 AMC 531, decided by Neterer, D. J., is typical of the long line of cases holding that a fisherman fishing on a lay, hired for a season, is entitled to that lay for the entire period of the season. There is no doubt that the rulings of the Industrial Accident Commission have no applicability whatever to the instant case, both by reason of the locus of the accident and by reason of the law applicable to said locus. It needs no citation of authority to establish that where the injury occurred

wholly upon a ship that the matter is completely within the droits of the admiralty. From time immemorial, seamen, including fishermen seamen, have been given special rights.

> "* * * considering the favor always shown in admiralty to seamen. * * *"
>
> *I. S. E. No. 2,* 15 Fed. (2d) at 751.

> "Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. The Arizona v. Anelich, supra (298 U. S. 123, 80 L. ed. 1081, 56 S. Ct. 707), and cases cited; Calmar S. S. Corp. v. Taylor, 303 U. S. 525, 82 L. ed. 993, 58 S. Ct. 651. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."
>
> *Socony Vacuum Oil Co. v. Smith,* 304 U. S. 424, at 431, 59 S. Ct. 262, 83 L. Ed. 265.

The Court stated in *The Henrietta,* 1933 AMC 1514, at 1516, 65 Fed. (2d) 940 (C. C. A. 1st):

> "The operation of fishing vessels under agreements, or lays, so called, for sharing the proceeds of the catch, has been familiar to those engaged in the business and to the courts for more than a century; and it has been held by the courts that, under a 'fishing lay', where the Captain employs the members of the crew and controls all the operations of the vessel, both in purchasing supplies for the voyage, in determining where he will fish, how long, and in disposing of the catch

and settling all the bills, he becomes the owner of the catch and settling all the bills, he becomes the owner *pro hac vice,* and that the crew is in the employ of the master and not the owner. *Carrier Dove* (C. C. A.), 97 Fed. 111, 112; *Adams v. Augustine,* 195 Mass. 289, 290, 291, 81 N. E. 192; *Costa v. Gorton-Pew Vessels Co.,* 242 Mass. 294, 136 N. E. 100; *Francis J. O'Hara, Jr., Case* (D. C.), 229 Fed. 312; *Mettacomet* (D. C.), 230 Fed. 208."

If the foregoing be accepted as the law, then it would make no practical difference whether the libellant endeavored to leave the ship five minutes after the completion of his assigned task or five hours later. He could have been ordered off the ship by the master and in fact was under the complete control of the master. The hazard present in leaving the ship was not increased by any tardiness, if such existed, in leaving the ship. The peril was not increased. See *The President Coolidge,* 1939 AMC 89, 23 Fed. Sup. 575.

II.

The equally ingenious device of the appellant in contending that a seaman injured while in the service of the ship is not entitled to wages beyond the end of the specific voyage, before the commencement of which, or during which, the injury occurs, rests upon the hope of the appellant that the case of *Enochasson v. Freeport Sulphur,* 7 Fed. (2d) 674, at 675, is not the law. If there ever was a case where the *hoped* for rule enunciated by the appellant would apply, that

would have been the case, for the facts show that the articles, although for six months service by the crew members, also provided that the master had the right and privilege of discharging any seamen at the termination of any voyage by giving thirty-six hours' notice; however, the court decisively followed the same rule as applied in the instant case by the District Court. Not only is the above case the law, but it has been such for more than a century. See *The Liberty Land,* 1923 AMC 1213; *The Emma Marie-Magellan,* 1933 AMC at 424-435; *O'Donnell v. Great Lakes D. & D. Co.,* 1942 AMC at 930, a case arising in the 7th C. C. A. May 22, 1942.

> "That record discloses that immediately after the injury, the injured seaman was removed to a hospital and there treated until August 27, 1940, when he was discharged at his own request and taken to his home. The court found as a fact that the appellant had been engaged in seasonal work under a contract for wages at $95 per month and his board and lodging valued at $1.40 per day and that the season began in March and ended in November, and concluded that the appellant was not entitled to maintenance, but awarded to appellant a sum equal to the amount he would have earned under the unexpired term of his contract at the rate of $95 per month. The argument is that appellant should recover, in addition to his wages, his maintenance at the rate of $1.40 per day.
>
> Unquestionably, the owner of a vessel is liable to a seaman injured in the service of his ship, for wages and keep during the employment, Calmar etc., v. Taylor, 303 U. S. 525, 1939 A. M. C. 341; Smith v. Lykes etc., 1939 A. M. C. 1122,

> 105 F. (2d) 604, comparable to that to which the seaman is entitled while at sea, The Henry B. Fiske, 141 Fed. 188; The Mars, 145 Fed. 446, 149 Fed. 729, and his right to maintenance may extend beyond the term of service, Calmar case, supra, 529."

The parallel between the above case lies in the fact that the employment of Evanisevich was for "the sardine season". *Allan v. S. S. Hawaiian,* 1940 A. M. C. 1136, 33 Fed. Sup. 985.

III.

Apparently appellant does not believe his fifth assignment of error has sufficient merit to argue the same, however, appellee cites *Gomes v. Pereira,* 1942 A. M. C. 481, 42 Fed. Sup. 328, as a complete answer to this assignment of error.

IV.

Answering appellant's Point IV, it needs no statement of authority to show that the State Workmen's Compensation Act has no applicability whatever for the work of the libellant in repairing a scoop net occurred on the ship and in navigable waters and as part and parcel of his duties to that ship, and in furtherance of the main purpose for which he was hired, to wit, fishing.

The appellant's *hope* that the Supreme Court, may, the next time this point is squarely presented, overrule the case of *So. Pac. Co. v. Jensen,* 244 U. S. 205,

61 L. Ed. 1086, 37 S. Ct. 524, L. R. A. 1918C 451, Ann. Cas. 1917E 900, 14 N. C. C. A. 597, certainly present no reason why this Court should attempt to anticipate such a move; to do so would certainly be a novel departure from the rule of *stare decisis.*

CONCLUSION.

The facts show that Evanisevich was employed for the sardine season, a fixed term, during which he was bounden to the ship and the ship to him. He was injured on the ship while endeavoring to leave her at a time when it was within his right to do so. The injury occurred on the ship which lay in navigable waters of the United States. The shares earned were agreed upon and fixed by the lower Court. We know of no better way to conclude than to quote from Benedict on Admiralty, Sixth Edition, Volume I, page 253, paragraph 83:

> "From very ancient times it has been held that a sailor who had fallen ill or been injured in the service or the ship is entitled to wages until the termination of his contract, and to his maintenance and cure at least as long as the voyage is continued, or to the end of his contract, regardless of whether the injury was occasioned by the negligence, his own or another's, or by simple accident."

Dated, San Pedro, California,
October 14, 1942.

Respectfully submitted,
DAVID A. FALL,
Proctor for Appellee.

No. 10,094

IN THE

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Appellants,

vs.

JOHN EVANISEVICH,

Appellee.

APPELLANTS' REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

The appellee does not in his brief challenge the correctness of appellants' "Statement of the Case" wherein the facts are set forth with reference to the pages of the Apostles on Appeal relied upon in support thereof. Appellants however have the following comments to make with reference to the appellee's "Statement of Facts" set forth on pages 1 to 3, inclusive, of appellee's brief:

Appellee's statement of facts is not complete and is misleading in at least one particular, to wit: "The libellant had remained on board as it was very hot and he was awaiting the *return* of the Skipper to determine if all the work had been completed." (Appellee's Br. p. 3.)

Aside from the fact that the appellee testified conclusively on his direct examination and his cross-examination that all work of every kind and character had been fully completed before any of the fishermen had their lunch, it is obvious that the appellee is representing to this Court that there was some testimony given which justifies the statement made in the appellee's brief. The statement is supposed to be supported by the record in the Apostles on Appeal [fol. 150].

The record shows that appellee was asked by his proctor why he stayed on the boat after he had had something to eat. The answer, verbatim, was as follows:

> "I stayed on the boat; there was *nothing* doing. I expected the Skipper was going to come down and see if everything was all right."

Appellants objected to the question which elicited this answer and moved to strike out the following portion of the answer: "I expected the Skipper was going to come down and see if everything was all right." The objection to the question: "Where (*sic*) did you say (*sic*) on the boat after you had something to eat?" (which obviously should have been: "*Why* did you *stay* on the boat after you had something to eat?") was made upon the grounds that it called for the appellee's conclusion and opinion and a self-serving declaration. This objection was overruled but an exception was noted. Appellants then moved "to strike out this part of the answer, particularly 'and I expected the Skipper was going to come down to see if every-

thing was all right,'" upon the ground that "it is not competent proof of any fact and states his conclusions and opinions, and is an expression of his ideas, if he ever had any such." [App. pp. 164-165.]

The objection should have been sustained and in lieu of that ruling the motion to strike should have been granted. As this appeal is a trial *de novo,* the appellants respectfully urge that the objection should now be sustained and the answer should be stricken from the record or at least that part of the answer specifically referred to in the motion to strike should be stricken out. Anyone who reads the record can see that the testimony given by the appellee on page 165 of the Apostles on Appeal was pure fiction injected into the case for the purpose of attempting to show some *compelling* reason for the presence of the appellee on the ship at the time of the accident. It had been conclusively established by the appellee's personal testimony prior to the stage of the proceedings now under discussion, that there was absolutely no reason whatever, connected with any service for the ship, justifying appellee's presence on the ship after he had finished his lunch.

Appellants also contend that the appellee does not in his "Statement of Facts" correctly or fairly give the substance of appellee's belated testimony. It is garbled and changed in a serious respect. Reading the appellee's brief, one would get the impression that the master of the ship had been upon the ship on the day of the accident. This must

have been the intention of appellee in narrating his alleged testimony because the appellee could not be "awaiting the *return* of the Skipper" unless the Skipper had been on the ship, had left, and was going to return, to the knowledge of the appellee. A person does not return to a place unless the person has already been to that place. It is peculiar to say the least that appellee does not set forth an *accurate* narrative of his testimony with reference to this "after-thought" reason for staying on the ship after lunch. The failure to correctly narrate the actual testimony and the substitution of a narrative which means something different from the actual testimony cannot be the result of inadvertence because the verb "return" was not used at all in the appellee's testimony.

Appellee testified on direct examination as follows:

I was going to go home from the boat because we were through with that morning's work. It was so hot, I didn't want to walk up and down, on account of the weather was so hot. We had finished everything we had to do before we left. Everything was completely through. [Ap. p. 99.]

On cross-examination appellee testified as follows:

(1) On the day of the accident the work I did personally was fixing what they call the scoop net. [Ap. pp. 117-118.]

(2) I quit working on the scoop net at 11 o'clock in the morning. Between 11 o'clock in the morning and 12 o'clock noontime on the date of my accident we had our

lunch. I can't tell exactly the time, the hour, but after we *finished* the work we went to lunch. I and the rest of the crew started to eat lunch at approximately 11 o'clock in the morning of the day of the accident. When I got finished with my lunch it was approximately 12 o'clock on the day of the accident. I had my accident around 1:30, close to 2 o'clock.

> "Q. What did you personally do between the time you finished your lunch and the time you had your accident? A. As you know it was very hot at that time and the other ones went away; some of them went away; I and some of our crew stayed in the boat, *because it was hot.* That is *all.*"

Between the time I finished my lunch and the time of the accident I drank beer; we had beer, because it was hot.

> "Q. What did you do between the time you started to eat lunch and the time you had your accident? A. We stayed on the boat *because it was very hot,* and I stayed myself.
>
> Q. What else did you do beside staying on the boat from the time you started your lunch and until the time you had your accident? A. Nothing." [Ap. pp. 118-121.]

It is quote obvious that the truth of the entire matter is simply this: From the time the appellee finished his lunch he loitered on the ship for his own convenience and he was not in the service of the ship at the time he was injured. His self-serving declaration of an alleged thought

which he now claims to have then had in his mind in a spurious attempt to show that his continued presence on the ship had some connection with a service to the ship is of no probative value and should be disregarded by this Court in view of the *facts* testified to by the appellee which demonstrate that *if* the appellee did anything which was a service to the ship at all it was "completely through," as appellee himself expressed it, prior to approximately 11 o'clock in the morning when he started his lunch and that the only reason he remained on board after lunch was that it was hot and there was some free beer available which he proceeded to drink.

This trial *de novo* should result in a reversal and a final decree in favor of the appellants. There is no equity in appellee's attempt to collect wages, maintenance or cure from the appellants.

Respectfully submitted,

LASHER B. GALLAGHER,

Proctor for Appellants.